TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 531.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CATESBY WOODFORD AND JOHN T. IRELAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED APRIL 23, 1913.

(23,660)

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a THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable, the Court of Appeals of Kentucky, at the Capitol, in Frankfort, Kentucky, on the 21st Day of February, A. D. 1913.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Appeal from the Fayette Circuit Court.

Be it remembered that heretofore, to-wit: on the 24th day of August, 1912, the appellant Louisville & Nashville Railroad Company by its counsel, filed in the office of the Clerk of the Court of Appeals, a transcript of record and evidence which is in words and figures following, to-wit:

1 STATE OF KENTUCKY:

Fayette Circuit Court.

CATESBY WOODFORD and JOHN T. IRELAND, Plaintiffs.
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Transcript of Record.

Proceedings of the Fayette Circuit Court (Twenty-second Judicial District) of Kentucky, Held in the Circuit Court Room of the Fayette County Court House in the City of Lexington.

Honorable Charles Kerr, sitting as Circuit Judge.

Be it remembered that heretofore, to-wit: on the 6th day of January, 1911, the plaintiffs by their attorneys, filed in the office of the Clerk of the Fayette Circuit Court, their petition, which, together with the proceedings had thereon read as follows:

The plaintiffs state that the defendant is a corporation created by and duly organized under the laws of this State and thereby empowered to contract and be contracted with, to sue and be sued and to own and operate, as a common carrier, a line of rail-way from Lexington, Kentucky, by way of Frankfort, Kentucky, to Louisville, Kentucky, and the South.

2 The plaintiffs state that, before and at the time of the acts herein complained of, the plaintiffs were the owners of seven thoroughbred yearlings, to-wit:

1. Chestnut Colt by Star Shoot, Dam, Last Cherry.
2. Chestnut Colt by Star Shoot, Dam, Blue Danube.
3. Bay Filly by Miller, Dam, Lady Beth.
4. Bay Filly by Miller, Dam, Lady Premier.
5. Black, or Brown, Filly by Ethelbert, Dam, Miss Wicks.
6. Black Colt by Jack Point, Dam, Lady Vincent.
7. Bay Colt by Star Shoot, Dam, Amy Davenport.

The plaintiffs state that on or about the 17th day of November, 1910, the defendant undertook and agreed, in consideration of $398.26 to it paid by plaintiffs, to carry, haul, convey, and transport from Lexington, Kentucky, to Jaurez, Mexico, said horses, and provided and furnished a car at Lexington, Kentucky, for that purpose into which plaintiffs, on or about the day aforesaid, in the City of Lexington, Kentucky, loaded said Horses; and that the plaintiffs, to afford necessary light in said car equipped said car with two suitable lanterns in the manner usual and customary in the shipment of horses over railroads and over the defendant's road, and the plaintiffs hung, strung and wired and anchored said lanterns in said car securely, except as against negligence and carelessness in the handling of said car by the defendant carrier, and thereby provided for lighting said car means which were safe for lighting said car, in the absence of carelessness and negligence on the part of the
3 defendant carrier.

The plaintiffs state that the defendant, in pursuance of its said undertaking, attached said car to its freight train at Lexington, Kentucky, and carried said car over its road as far as its Freight yards at West Frankfort, Kentucky, and that the defendant, its agents, employees and servants, in the night time when said lanterns were lighted, and in or about West Frankfort, Kentucky, negligently and carelessly struck, hit, bumped, crashed and jammed said car, in which said horses were being hauled, against its engine and other cars with such force and violence and concussion that the defendant thereby tore down one of said lanterns, while so lighted, and broke same, and thereby set fire to said car and its contents, and so severely burnt three of said horses, to-wit:

1. Chestnut Colt by Star Shoot, Dam, Last Cherry.
2. Chestnut Colt by Star Shoot, Dam, Blue Danube.
3. Bay Filly by Miller, Dam, Lady Beth.

of the value of $8,000.00, $7500.00. and $2500 respectively, that they had to be and were killed; and the defendant thereby burned the filly, Miller-Lady Premier, on the nose and back, and the Filly Ethelbert-Miss Wicks, on the side and about the foretop and ears, and the colt Jack Point-Lady Vincent, about the foretop and mane, and shocked the nervous system of the said Bay Filly by Miller, Dam, Lady Premier, Black, or Brown, Filly Ethelbert, Dam, Miss Wicks, Black Colt Jack Point, Dam, Lady Vincent, and the bay colt by Star Shoot, Dam, Amy Davenport; of the value, just before said negligent acts of the defendant, of $1200.00, $1,000.00, $1500.00 and $5000.00 respectively, and impaired their racing qualities and

very greatly lessened their salable value in the market, by reason of the experience of the stock and fire-panic through which they passed, to-wit: in a sum not less than 75% of the value, in
4 the market, of each, just prior to said negligent acts as aforesaid, all of which was to the damage of the plaintiffs in the sum of $24525.00 no part of which has been paid.

Wherefore: The plaintiffs pray judgment against the defendant, Louisville and Nashville Railroad Company, in the sum of $25250.00 in damages, and they pray for their costs herein expended and all proper relief.

ROB'T B. FRANKLIN.
ROB'T C. TALBOTT.

And on the same day to-wit, on the 6th day of January, 1911, a summons was issued on said petition which is in words and figures as follows, viz:

Fayette Circuit Court.

Summons Ordinary.

The Commonwealth of Kentucky to the Sheriff of Fayette County, Greeting:

You are commanded to summon Louisville and Nashville Railroad Company to answer a petition filed against it in the Fayette Circuit Court by Castesby Woodford and John T. Ireland and warn it that upon its failure to answer, for twenty days after service hereof, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons as provided by law.

Witness James C. Rogers, Clerk of said Court, this 6th day of Jan. 1911.

JAMES C. ROGERS, *C. F. C. C.*

5 Executed the within summons January 9, 1911, on the Louisville and Nashville Railroad Company by delivering it to its chief officer and agent in and for this County.

F. B. CARR.

A true copy.
D. W. SCOTT, *S. F. C.*,
By FRANK ROGERS, *D. S.*

And on a day following, to-wit: on the 28th day of January, 1911, the defendant filed a general demurrer herein, in words and figures as follows, viz:

Now comes the defendant, Louisville and Nashville Railroad Company, and not waiving its special demurrer to the jurisdiction of the court, demurs to the petition, and for ground of demurrer says that it does not state facts sufficient to constitute a cause of action.

R. A. THORNTON,
Attorney for Defendant.

And on the same day, to-wit: the 28th day of January, 1911, the defendant filed a special demurrer herein, in words and figures as follows, viz:

Now comes the defendant, Louisville and Nashville Railroad Company, and demurs specially to the petition herein, and for grounds of demurrer says that, in this action this court has no jurisdiction of the person of the defendant, or of the subject of the action.

R. A. THORNTON,
Attorney for the Defendant.

6 And afterwards at a term held for said circuit court an order was entered herein, in words and figures as follows, viz:

By consent of parties the special demurrer to the petition is this day heard. The same being heard is sustained. By consent the plaintiffs are permitted to amend and by consent plaintiffs now file their amended petition herein. By consent defendant is given until February 27th to file its answer.

The amended petition filed and noted herein on the 13th day of February, 1911, is in words and figures as follows, viz:

The Pl'ffs with leave of Court amend their petition herein & for amendment state the contract or agreement set out in the petition by which def't undertook to haul and transport said horses from Lexington, Ky. to Jaurez, Mex. was made & entered into between Pl'ffs & Def't in this Fayette County, Ky.

Wherefore Pl'ffs pray as in their original petition, and for all proper relief.

ROB'T B. FRANKLIN &
ROB'T TALBOTT,
Att'ys — Pl'ffs.

And afterwards at a term of court held in said circuit on the 27th day of February, 1911, the following order was entered, to-wit:

Comes the defendant, Louisville and Nashville Railroad Company, and files an answer herein, which is noted.

The answer filed and noted herein on the 27th day of February, 1911, is in words and figures as follows, viz:

7 1. The defendant, Louisville and Nashville Railroad Company, for answer to the petition herein says it has no knowledge or information sufficient to form a belief as to whether the plaintiffs, before or at the time of the several acts in the petition complained of were jointly or severally the owners of the eight alleged thorough-bred yearling colts and fillies in the petition mentioned: that it has no knowledge or information sufficient to form a belief as to whether the alleged respective pedigrees of the said several colts and fillies are correct.

Defendant denies that by the contract under which said colts and fillies were shipped it agreed or undertook that it would convey them from Lexington, Kentucky, and deliver them at Jaurez, Mexico; it denies that the plaintiffs equipped said alleged car with two or any

suitable lanterns in the manner usual or customary in the shipment of horses over railroads, or over defendant's road; and it denies that plaintiffs hung, or strung, or wired, or anchored said alleged lanterns in said alleged car securely, except as against negligence or carelessness in the handling of said alleged car by this defendant; and it denies that the plaintiffs provided for lighting said alleged car means which were safe for lighting it in the absence of carelessness or negligence on the part of this defendant.

Defendant denies that, on the occasion in the petition alleged, this defendant, or its agent or employees or servants, or any of them, negligently or carelessly struck, or hit, or bumped, or crashed, or jammed said alleged car, in which it is alleged said colts and fillies were being hauled, against defendant's engine, or other cars with such, or with any, force *force* or violence or concussion that
8 thereby the defendant tore down one of said lanterns while so lighted and broke the same, or thereby set fire to said alleged car or its contents, and so severely burned three of said alleged horses, to-wit:

1. Chestnut Colt by Star Shoot, dam Last Cherry;
2. Chestnut Colt by Star Shoot, dam, Blue Danube;
3. Bay Filly by Miller, dam, Lady Beth;

of the value of $8,000.00, $7,500.00 and $2,500.00, respectively, or of any value, that they or either of them had to be killed; or that thereby defendant burned the alleged filly, Ethelbert-Miss Wicks, as alleged or at all, or the alleged colt, Jack Point-Lady Vincent, as alleged or at all, or that thereby the defendant shocked the nervous*ness* systems of the alleged bay filly by Miller dam Lady Premier, or of the alleged black or brown filly Ethelbert dam, Miss Wicks, or of the alleged black colt by Jack Point, dam Lady Vincent, or of the bay colt by Star Shoot, dam Amy Davenport; of the alleged value just before said alleged negligent acts of $1,200.00, $1,000.00, $1,500.00 and $5,000.00, respectively; or that thereby defendant impaired the racing value of said horses, or of any of them, or greatly, or at all, lessened their salable value, or the salable value of any of them, in the sum of seventy five per cent, or in any sum, in the market, just prior to said alleged negligent acts; and defendant denies that, by said alleged negligence or by any negligence of the defendant, or of any of its agents or employees, said horses, or any of them, were burned, or caused to be destroyed, or were injured, or that it has damaged the plaintiffs in the sum of twenty five thousand two
9 hundred and fifty dollars, $24,525 or in any sum whatsoever.

2. For further and additional answer defendant, Louisville and Nashville Railroad Company, says that by the contract of transportation under which said seven colts and fillies were delivered by the plaintiffs to and were received by defendant they were consigned to the plaintiff, J. T. Ireland, at Juarez, in the republic of Mexico, which point of destination of said horses was and is beyond the terminus of this defendant's line; that the said contract provided that where the destination was beyond this defendant's line defendant should transport said colts and fillies towards the said destination

only as far as its line of railway extended; and said contract further provided that said colts and fillies should be in charge of and accompanied by four attendants; that when they were delivered to this defendant for transportation as aforesaid they were in charge of Chester Frakes and Horace Moore, agents of the plaintiffs, who accompanied them over the defendant's road, and they were the only attendants or agents of the plaintiffs who were in charge of or who accompanied said horses; that upon the occasion in the petition mentioned, and in Franklin county, Kentucky, the said Frakes and the said Moore, while in charge of said colts and fillies as such agents, were each guilty of negligence, on their part, and through their said agents plaintiffs were guilty of negligence, and that said negligence of the plaintiffs and of the said Frakes and of said Moore directly contributed to the burning and destruction of and the damage to said colts and fillies complained of by the plaintiffs, and that but for said negligence on the part of the plaintiffs, and of their said
10 agents neither the injuries to nor the burning nor destruction of said colts and fillies, nor any of them, would have occurred.

Wherefore, having fully answered the defendant prays to be dismissed hence with its costs herein.

R. A. THORNTON, *P. D.*

And at a term of court held for said circuit on the 10th day of March, 1911, an order was entered herein, which is in words and figures as follows, viz:

By consent, plaintiffs file their motion and reply herein which is noted.

The Motion and Reply filed and noted herein on the 10th day of March, 1911, is in words and figures as follows, viz:

Come the plaintiffs and move the Court to strike from the answer herein the following words:

"which point of destination of said horses was and is beyond the terminus of this defendant's line; that said contract provided that where the destination was beyond the defendant's line the defendant should transport said colts and fillies towards the said destination only as far as its line of railway extended";

because it is not alleged or claimed by the defendant in its answer that the injuries complained of happened or occurred at a point beyond the terminus of the defendant's line, at Frankfort, Kentucky.

Without waiving said motion, the plaintiffs for reply deny that said contract (which merely permitted four attendants) provided that said colts and fillies should be in charge of or accompanied by four attendants, and the plaintiffs deny that upon the occasion mentioned in the petition, or in Franklin County, Kentucky, or
11 elsewhere, or at all, the said Frakes, or the said Moore, or either of them, while in charge of the said colts and fillies, as such agents, or at all, were each, or either, guilty of negligence on their part, or on the part of either; or that their said agents, or either of them, or at all, the plaintiffs, or either of them, were guilty of

negligence; or that said alleged negligence of the plaintiffs, or either of them, or of said Frakes or of the said Moore, directly or at all, contributed to the burning or destruction of or the damage to the said colts or fillies; or that, but for said alleged negligence on the part of the plaintiffs, or either of them, or of their agents, or either of them, that the injury, or injuries to, or the burning, or destruction of, said colts, or any of them, or said fillies, or any of them, would not have occurred. And the plaintiffs deny the alleged negligence and the alleged contributory negligence imputed to their agents in the defendant's answer, and they deny the alleged negligence and the alleged contributory negligence imputed to the plaintiffs in the defendant's answer.

Wherefore: The plaintiffs pray as in their petition, for their costs herein expended and all proper relief.

ROB'T B. FRANKLIN,
ROB'T C. TALBOTT,
Att'ys.

And at a term of court held for said circuit on the 3rd day of April, 1911, an order was entered herein, which is in words and figures as follows, viz:

12 Ordered that this cause be now placed upon the Common Law Trial Docket for assignment.

And afterwards on the 19th day of November, 1911, the defendant filed a motion herein, which is in words and figures as follows, viz:

The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action was in writing, and that is has not been filed as an exhibit with the petition, nor as a part hereof; and defendant now moves that the plaintiffs be required to file the said written contract as an exhibit with their said petition.

R. A. THORNTON,
Attorney for Defendant.

And at a term of court held for said circuit on the 11th day of November, 1911, an order was entered herein, which is in words and figures as follows, viz:

Ordered that this cause be assigned for trial on November 24th, 1911.

And at a term of court held for said circuit on the 18th day of November, 1911, an order was entered herein, which is in words and figures as follows, viz:

Come the plaintiffs and file the contract of shipment referred to in the petition herein and the same is now noted of record.

Ordered that this cause be assigned for trial on December 12th, 1911.

13 The contract of shipment filed and noted herein on the 18th day of November, 1911, is in words and figures as follows, viz:

Form 113.—Revised July, 1908.

Louisville & Nashville Railroad Company's Contract for the Transportation of Live Stock Over Its Own Lines.

LEXINGTON, KY., STATION, 11/17, 1910.

This contract entered into at the above time and place between the Louisville & Nashville Railroad Company, hereinafter called the carrier, and —— —— hereinafter called the shipper.

Witness, That the carrier will carry live stock at the rates established by it therefor, or, where certain risks, duties, and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates.

In the present instance the shipper elects to avail himself of the said reduced rate, and has delivered on the cars of the carrier the following described live stock, to-wit:

Consignee, Destination, &c.	Description of Stock.	Car Number.
J. T. Ireland, Juarez, Mex.	8 Race Horses. 4 Attendants.	A. P. H. 5011

Charges $62.96 Rent
2.00 bed.
16.00 Swg.

14 The carrier agrees to transport said live stock to destination if on said carrier's line of railroad, otherwise to the place where said live stock is to be received by the next connecting carrier for transportation to or towards destination, and the carrier guarantees that the freight rate thereon from point of shipment to destination shall not exceed the reduced rate of $323.30 per —.

In consideration of all of which the shipper hereby agrees to assume the risks, duties, and liabilities hereinafter specified, and that the transportation shall be upon the following conditions, which are admitted and accepted by said shipper as just and reasonable, viz:

1. The shipper hereby releases the carrier from all liability in the transportation of said live stock, except as hereinafter agreed, and agrees that such liability shall be only that of a private carrier for hire, and that all liability of the carrier shall cease at the station to which such live stock is destined, if its destination be on the carrier's line of railroad, or if destined to a point beyond said carrier's line of railroad, then at said carrier's station, at its terminus, when ready to be delivered to the shipper, consignee, or carrier whose line may constitute a part of the route to destination.

2. The shipper has examined and found in good order and condition the car or cars provided by said carrier for the transportation of said animals, and hereby accepts the same and agrees that they are, as thus provided, suitable and sufficient for said purpose; and said shipper will at his own expense provide such bedding or other suitable appliances in said car or cars as will enable said animals

to stand securely on their feet while in the same, and said
15 shipper hereby releases said carrier from all liability for and on account of any and all injury or injuries which the said animals, or any of them, may receive in consequence of any or either of them being vicious, wild, unruly, or weak; and in consequence of any of them being killed, or maimed, bruised, or otherwise injured; and in consequence of heat, suffocation, or other ill effects of being crowded in the cars; and in consequence of being injured by the burning of hay, straw, or other material used by the shipper or his agent for feeding or bedding the said animals, or otherwise; and also from all damage or injury or loss which may be sustained by reason of any delay or detention in such transportation, whether occasioned by any mob, strike, or threatened violence to person or property from any source, and from any injury to track or yards, and from any and all other causes, whether mentioned herein or not, and from the escape of any of said animals, and for loss or damage to said animals from any cause or thing whatever not resulting from the negligence of the agents or servants of said carrier.

3. Said shipper will separate the different kinds of stock in said car or cars by strong partitions, which he will provide at his own expense and risk, and said stock shipped in mixed car load or carloads shall be at the entire risk of the shipper on account of any damage that may occur by reason of partitions in said car or cars not being properly made and sufficiently strong to prevent damage to said stock.

4. Said shipper will load and unload said animals at his own risk, and feed, water, and attend the same at his own expense and risk while they are in the stockyards of the carrier awaiting shipment, and while on the cars or at feeding or transfer points, or where they may be unloaded for any purpose.

16 5. Said shipper will see that said animals are securely placed in the cars furnished, and that the cars are securely and properly fastened so as to prevent the escape of said animals therefrom.

6. The employees of the said carrier shall provide the owner or person in charge of the said animals all proper facilities on trains and at stations for taking care of the same, but the business of the said carrier shall not be delayed by the detention of trains to unload and reload said animals for any cause whatever; but the cars may be left at a station upon the request of the person in charge of the same, and unloaded or reloaded by him to be forwarded by the next freight train if he so directs; and said carrier shall not be held liable for any damage or injury that may occur to said animals during the time the same may remain so unloaded and out of the cars as aforesaid; and in case said animals are kept over at any given point by the said shipper or his agent beyond a reasonable length for feeding and watering, subject always to local laws of any State through which they may pass while in transit, then this contract shall be held to be voidable, at the option of the said carrier, and in such case such rates of freight may be imposed and

collected by said carrier as may be deemed proper, not to exceed local rates from point where received for transportation to such point of detention.

7. In case of accident to or delay of trains, from any cause whatever, the shipper is to feed, water, and take proper care of said animals at his own expense.

8. The presentation of this bill of lading shall be sufficient evidence of ownership to relieve and release the carrier from all liability on account of wrong delivery, but shall not be held to operate against the rights of the carrier to demand, if it elect, the
17 identification of the party presenting this contract before delivering the said animals to him.

9. Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack $150; for a horse or mule $100; mare and colt together $100; yearling $50; cow and calf together $35; domestic horned animals $30 each; yearling cattle, each, $15; calves, hogs, sheep or goats, $5 each; chickens, ducks and guinea fowls $2.50 per dozen; geese $3.50 per dozen, and turkeys $5.00 per dozen; which amounts it is agreed are as much as animals as are herein agreed to be transported are reasonably worth.

10. In case the said carrier shall furnish laborers to assist in loading and unloading said animals, they shall be subject to the orders and deemed employés of said shipper while so assisting.

11. As a condition precedent to the shipper's right to recover any damages for loss or injury to said animals, he will give notice in writing of his claim thereof to the agent of the railroad company or other carrier from whom he receives said animals before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals.

12. When necessary for said animals to be transported over the line or lines of any other carrier or carriers, to the point of destination, this contract shall, unless otherwise agreed in writing between such other carrier or carriers and the shipper, constitute the contract between the shipper and each of such other carriers
18 respectively for the transportation over so much of its line as said shipment passes over in order to reach destination; and in no event shall one carrier be liable for the transportation of said animals over the line or lines of any other carrier, or liable for the negligence of any other carrier or carriers.

In witness whereof the parties have hereunto subscribed their names.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By J. T. IRELAND, *Agent.*
F. B. CARR.

Witness:
J. M. SMITH.

(To be other than either signer of the contract.)

Stamped on the face of this exhibit is the following, to-wit:

L. & N. R. R. Co.
Lexington, Ky.
Paid
Nov. 17, 1910.
F. B. Carr, General Agent.

The attention of shippers has been called to the terms, conditions, value etc. herein named.

And at a term of court held for said circuit on the 29th day of November, 1911, an order was entered herein, which is in words and figures as follows, viz:

Ordered that this cause be assigned for trial on December 14th, 1911.

19 And at a term of court held for said circuit on the 11th day of December, 1911, an order was entered, herein, which is in words and figures as follows, viz:

Upon the affidavit of F. B. Carr and statement of R. A. Thornton Counsel this day filed and noted, it is now ordered by the Court that Mamie Kelley attend personally for oral examination in Court upon the trial of this cause as a witness for defendant, upon subpœna.

The affidavit and statement filed and noted herein on the 11th day of December, 1911, is in words and figures as follows, to-wit:

Affiant, F. B. Carr, says that the defendant Louisville & Nashville Railroad company, is a corporation, duly incorporated and organized under the laws of the state of Kentucky, with its chief place of business in the city of Louisville, Kentucky; that the testimony of Mamie Kelley is important for the defendant in this cause, and that the just and proper effect of her testimony cannot in a reasonable degree be obtained without an oral examination in court.

Affiant says that he is the chief officer and agent of the defendant company in Fayette county, Kentucky.

F. B. CARR.

Subscribed and sworn to before me by F. B. Carr this December 11th, 1911.

JAMES C. ROGERS, *C. F. C. C.*,
By GEO. S. MORGAN, JR., *D. C.*

20 R. A. Thornton says that he is the attorney in this cause of the defendant, and that the true and proper effect of the testimony of the witness Mamie Kelley can not be obtained without an oral examination in court, and that her testimony is important for the defendant.

This December 11, 1911.

R. A. THORNTON.

And at a term of Court held for said circuit on the 18th day of December, 1911, an order was entered herein, which is in words and figures as follows, viz:

The parties appeared and answered ready; thereupon came the following jury, to-wit:—J. F. Looney, Fayette Johnston, R. W. Davis, Thomas Carr, Newt. Combs, Roger Kearney, W. H. Barkley, T. F. Gannon, D. R. Messick, W. D. Rash, R. H. Tacke and H. F. Wilkerson, who were duly sworn to try the issue.

Mary A. Chiles, the Official Stenographic Reporter of this Court, was directed to record the testimony and proceeding of this trial.

The trial progressed and not being concluded at the hour of adjournment the jury were adjourned under the admonition of the Court until Tuesday morning at nine (9) o'clock.

And at a term of court held for said circuit on the 19th day of December, 1911, an order was entered herein, which is in words and figures as follows, viz:

The parties appeared and the jury empaneled herein met pursuant to adjournment.

21 The trial progressed and not being concluded at the hour of adjournment the jury were adjourned under the admonition of the Court until Wednesday morning at nine (9) o'clock.

And at a term of court held for said circuit on the 20th day of December, 1911, an order was entered herein, which is in words and figures as follows, viz:

The parties appeared and the jury empaneled herein met pursuant to adjournment.

The trial progressed and not being concluded at the hour of adjournment the jury were adjourned under the admonition of the Court until Friday morning at nine (9) o'clock.

And at a term of court held for said circuit on the 22nd day of December, 1911, an order was entered herein, which is in words and figures as follows, viz:

The parties appeared and the jury empaneled herein met pursuant to adjournment.

The trial progressed and being concluded the jury retired and returned into Court the following verdict, viz:

"We the Jury find for the Plaintiffs in the sum of ($15,000) Fifteen Thousand Dollars.

J. ROGERS KEARNEY, *Foreman.*

Wherefore it is adjudged by the Court that the plaintiffs, Catesby Woodford and John T. Ireland, recover of the defendant, Louisville and Nashville Railroad Company, the sum of Fifteen Thousand Dollars ($15,000.00) with interest thereon at the rate of six per cent per annum from December 22nd, 1911, until paid and also their costs herein expended.

22 And at a term of court held for said circuit on the 23rd day of December, 1911, an order was entered herein, which is in words and figures as follows, viz:

Defendant, Louisville and Nashville Railroad Company, moves the Court to set aside the judgment and to grant it a new trial of this action, and files grounds in support of said motion, which are noted.

The motion and grounds for a new trial filed and noted herein on the 23rd day of December, 1911, are in words and figures as follows, viz:

Defendant, Louisville and Nashville Railroad Company, moves the court to set aside the judgment and to grant it a new trial of this action, upon the following grounds, to-wit:

1. The Court erred in admitting irrelevant and incompetent testimony offered by the plaintiffs, and objected to by the defendant, to which ruling of the court the defendant excepted at the time;

2. The court erred in refusing relevant, competent & material testimony offered by the defendant, to which ruling of the court the defendant at the time excepted;

3. The court erred in refusing to give to the jury upon defendant's motion, on the conclusion of all the testimony, the following instructions which were offered by the defendant, to-wit: Instructions marked A. B. C. D. and E. respectively; to which ruling of the court defendant excepted at the time;

4. The court erred in giving to the jury, on its own motion, at the conclusion of all the testimony, the following instructions marked 1, 1½, 2, 3, 4, 5, and 6, respectively, to which ruling of the court the defendant excepted at the time;

23 5. The verdict of the jury is not sustained by sufficient evidence and is contrary to law;

6. The damages given by the jury in its verdict are excessive, and were given by the jury under the influence of prejudice and passion on the part of the jury against the defendant.

7. Errors of law occurring at the trial and excepted to by the defendant at the time.

LOUISVILLE & NASHVILLE R. R. CO.,
By R. A. THORNTON, *Att'y.*

And at a term of court held for said circuit on the 6th day of January, 1912, an order was entered herein, which is in words and figures as follows, viz:

Came the defendant, Louisville and Nashville Railroad Company, and in open Court moved the Court for leave to file a ground for a new trial of this cause and in addition to the grounds filed herein on December 23rd, 1911, and also to file the affidavits of C. R. Staples, F. B. Carr, and R. A. Thornton respectively in support of said motion and additional ground for a new trial, to which motion the plaintiffs, through their counsel, Robert Talbott, objected, which objection was overruled by the Court, to which ruling plaintiffs then excepted, and thereupon, by leave of Court, defendant filed said motion and additional ground for a new trial of this cause and

said affidavits in support thereof, and thereupon plaintiffs through their said counsel moved the Court for time until January 14, 1912, within which to file counter affidavits, which motion was sustained by the Court, and time given the plaintiffs until said date for said purpose, and by consent the hearing of defendant's motion for a new trial was passed until January 13, 1912.

24 The additional motion and grounds for a new trial filed herein on the 6th day of January, 1912, are in words and figures as follows, viz:

Defendant, Louisville & Nashville Railroad Company, says that one John E. Madden was sworn, and was the last and one of the most material witnesses, for the plaintiffs upon the question as to the value of two of the plaintiffs' colts which were killed as the result of the accident mentioned in the petition, upon which colts a higher valuation was placed by the plaintiffs in said petition than upon any other of the colts or fillies mentioned therein; that immediately after said Madden left the stand, as a witness for plaintiffs he withdrew from the court room and stopped in the lobby of the said court room near by the door opening from said room into said lobby, and that while said Madden was standing near the said door, and while he was still under the rule as such witness, and before the testimony in the case had been completed, the jury which was trying the case passed through said door from the court room into said lobby and within six or eight feet of said Madden and within easy hearing of him, that while they were thus passing him he turned and faced the jury, and as if intentionally talking to them, said, in a loud tone of voice, which they could easily hear, and which they or many of them did hear, "you know I am stuck on those Star-Shoot Blue Danube colts because I sold one of them for $30,000, and I think they are darned good colts."

Defendant says that it did not discover and it had no knowledge whatever of nor information as to said facts until after the termination of said trial and the motion and grounds for a new trial of this cause had been filed herein, and it now makes the facts above set out an addition- ground for a new trial of this action and

25 moves the court to set aside said judgment and grant it a new trial upon the grounds set out in its motion filed herein, on December 23, 1911, and now last above set out.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By R. A. THORNTON, *Its Attorney.*

The affidavit of C. R. Staples filed by the order of January 6th, 1912, is in words and figures as follows, to-wit:

Affiant states that he is a resident of the City of Lexington, County of Fayette and that at the close of Plaintiffs' evidence in chief, he was standing in the corridor of the Court House just outside the door leading to the attorneys' entrance to the Circuit Court room discussing various topics when, John E. Madden who had just left the witness stand joined the party of gentlemen and

began dicussing the breedings of various horses about which the above named suit was filed. The affiant further states that about this time an intermission was granted by the Court and the Jury in this case filed out the door of Court room within a very few feet of affiant and John E. Madden and other gentlemen whose names he cannot now recall, whereupon John E. Madden turned facing the jury and remarked as if intentionally talking to them in a loud tone of voice the following: "You know that I am stuck on those Star-Shoot-Blue Danube colts because I sold one for #30,000. (or #50,000) and I think they are darned good colts." or substantially those words.

26 Affiant states that this statement was made in such a loud tone of voice that it attracted the attention of several members of the Jury who turned and faced him while the remarks were being made, and that at the time these remarks were made, Mr. Madden was within six or eight feet from the Jury and his voice was raised sufficiently loud to have been heard by the entire Jury.

C. R. STAPLES.

Subscribed and sworn to before me by C. R. Staples this the 4th day of January 1912.

My commission expires Jan'y 24, 1914.

R. L. NORTHCUTT,
Notary Public, Fayette County, Kentucky.

The affidavit of F. B. Carr filed by the order of January 6th, 1912, is in words and figures as follows, to-wit:

Affiant, F. B. Carr, says that he now is and for a number of years last passed, has been the chief officer and agent for the defendant, Louisville & Nashville Railroad Company, in Fayette County, Kentucky; that he has read the affidavit of C. R. Staples filed in this case on the — 1912, and also the additional ground for a new trial filed herein on January 6, 1912, and says that, on information he verily believes the statements of said affidavit and of said additional motion and ground to be true; that he had no knowledge of or information in regard to the facts or any of them stated in said affidavit until after the termination of the trial of this case and the filing of the motion and grounds for a new trial therein, and that he verily believes that no officer or agent of the defendant company had any knowledge of or information as to said facts

27 or any of them, until after the termination of said trial, and the filing of the said motion and grounds for a new trial therein.

And further this affiant saith not.

F. B. CARR.

FAYETTE COUNTY, KY.:

Subscribed and sworn to before me by F. B. Carr, this January 6, 1912. My commission expires Jan'y 24, 1914.

R. L. NORTHCUTT,
Notary Public, Fayette County, Kentucky.

The affidavit of R. A. Thornton filed by the order of January 6th, 1912, is in words and figures as follows, to-wit:

Affiant, R. A. Thornton, says that on the trial of this cause in this court he was, and now is, the sole counsel for the defendant, Louisville & Nashville Railroad Company, and that as such counsel he prepared and filed in open court on Saturday December 23, 1911, the motion and grounds for a new trial of the case; that when he prepared and filed said motion and grounds he had not discovered and had no knowledge of nor any information as to the conduct of one John E. Madden set out in the affidavit of C. R. Staples, and in the additional motion and grounds for a new trial of this case which were respectively filed herein in open court on January 6, 1912, and that he had not discovered nor had any information of nor as to such incident or conduct for several days after the trial of this case had terminated and the original motion and grounds for a new trial had been filed in court, and that because of the ignorance of the defendant and himself of the said conduct he was unable to embrace the said additional ground for a new trial in the said original motion and grounds; and affiant further says that
28 there has been no motion day of this court since Saturday December 23, 1911.

And further affiant saith not.

R. A. THORNTON.

FAYETTE COUNTY, KY.:

Subscribed and sworn to before me by R. A. Thornton this January 6, 1912. My commission expires Jan'y 24, 1914.

R. L. NORTHCUTT,
Notary Public, Fayette County, Kentucky.

And at a term of court held for said circuit on the 13th day of January, 1912, an order was entered herein, which is in words and figures as follows, viz:

Come the plaintiffs and tender and move to file the joint affidavit of the jurors who tried this case, the affidavit of D. W. Scott and also the affidavit of John E. Madden herein, and the same are marked "Tendered."

The joint affidavit of the members of the jury tendered herein on the 13th day of January, 1912, is in words and figures as follows, viz:

The undersigned affiants say they were members of the Jury which tried the above styled case in this Court in December 1911; that they are informed the defendant has made a motion for a new trial of the case based in part upon the affidavit of one, C. R. Staples, a copy of which is hereto attached.

29 Now we of the Jury, who tried above case on oath, say that Mr. John E. Madden at no time, anywhere, said anything to the Jury or anything in the presence of the jury with reference to any matter, person or thing involved in said case except when he was on the witness stand in the open court testifying as a witness, that was either heard or listened to, or that was understood

or commented upon by any member of the Jury, or that in any measure prejudiced or influenced any member of the Jury as the undersigned members of said Jury respectively assert and verily believe.

Each of the undersigned says that Mr. Madden did not turn facing the Jury as if intentionally talking to them, and remark either in words or substance, in so far as they saw or heard, in a loud or any other tone of voice "You know that I am stuck on Star-Shoot-Blue Danube colts because I sold one for $30,000 (or $50,000). I think they are darned good colts".

Each of the undersigned says that he tried said case according to his oath and was influenced in making his verdict solely and only upon the evidence introduced on the trial which the Jury was permitted by the Court to consider, and by the instruction given by the Honorable Judge of this Court. They further say that there was no partiality, no prejudice, no feeling and no passion on the part of any member of the Jury with reference either to the subject matter of the trial or with reference to the parties to the suit; that the verdict was the honest and unanimous expression of the Jury, honestly and conscientiously arrived at under their oaths after a fair and impartial consideration of the matters submitted to them.

	FAYETTE JOHNSTON.	R. W. DAVIS.
30	T. F. GANNON.	RICHARD H. TACKE.
	W. D. RASH.	H. F. WILKERSON.
	W. H. BARKLEY.	J. ROGER KEARNEY.
	T. N. COMBS.	THOMAS CARR.
	D. R. MESSICK.	JAS. T. LOONEY.

Subscribed and sworn to before me by Fayette Johnston and T. F. Gannon at Lexington, Ky. this January 9th, 1912.

LILY S. McCANN,
N. P., F. Co., Ky.

My commission expires March 12th, 1914.

Subscribed and sworn to before me by W. D. Rash, W. H. Barkley, I. N. Combs, D. R. Messick, R. W. Davis, Richard H. Tacke, H. F. Wilkerson, J. Roger Kearney, Thomas Carr & Jas. T. Looney, this 9th day of January, 1912.

JAMES C. ROGERS, *C. F. C. C.*,
By GEO. E. DE LONG, *D. C.*

The affidavit of C. R. Staples referred to in the foregoing affidavit of Members of the Jury may be found on pages 23 and 24 of this record.

The affidavit of D. W. Scott tendered herein on the 13th day of January, 1912, is in words and figures as follows, viz:

Affiant D. W. Scott says that he is the duly elected qualified and acting Sheriff of Fayette County, Ky. and was such and so acting at the time of the trial of above styled cause in the Fayette Circuit court in December 1911.

31 Affiant says that he has read the affidavit of one C. R. Staples on file in said case in support of defendant's motion for a new trial.

Affiant says that at the time mentioned in the affidavit of said Staples, he, this Affiant, was standing at the foot of the steps on the second floor of the Court House in Lexington, that he then saw John E. Madden, at the head of the steps with his hand on the newel post and apparently in the act of starting down, just as the Jury trying the case came out the door through which Attorneys enter the Court room that Mr. Madden's back was toward that door and the Jurors at that time, that he saw Mr. Madden look over his shoulder toward the Jury and immediately and hurriedly come down the steps. Affiant says that Mr. Madden did not turn and face the Jury, that it is not true that several of the Jurors turned and faced Mr. Madden.

Affiant says that he was looking directly at Mr. Madden and beyond him towards the Jurors and in so far as he could see or hear Mr. Madden addressed no remark whatever to the Jurors or any of them but immediately came down the steps as aforesaid.

D. W. SCOTT.

Subscribed and sworn to before me by D. W. Scott this January 9th, 1912.

EDGAR M. O'DEAR,
Notary Public, Fayette County, Kentucky.

My commission expires January 31, 1912.

The affidavit of John E. Madden tendered herein on the 13th day of January, 1912, is in words and figures as follows, viz:

32 Affiant John E. Madden says he is informed that the Defendant has made a motion for a new trial in the above styled case and in support of said motion has filed the affidavit of one C. R. Staples which affidavit this affiant has read.

Affiant says that when he left the witness stand he went immediately into the rotunda of the Court House through the door through which spectators leave the Court room—that just outside that door, and as he walked to the head of the steps he passed a few words with Mr. Walter House, that when he reached the head of the steps he stopped for just a moment—Mr. House remarked—"I came here to hear you testify I thought you were going to explain about Uncle"—to which affiant replied—"I was asked about that but was not permitted to make explanations—I wish I had been permitted to explain for I sold him for thirty Thousand dollars", Affiant at that instant had his hand on the Newel Post at the head of the steps—Mr. House remarked "they have turned the jury loose", affiant turned his head and saw some of the jury coming out of the door through which attorneys enter the Court room. Affiant was in a hurry and immediately descended the steps and left the Court House. Affiant says that he did not turn facing the jury—that he did not remark as if intentionally talking to the jury in a loud tone of voice or in any tone of voice or say at all—"You know

that I am stuck on those Star-Shoot, Blue Danube Colts, because I sold one for $30,000.00 (or $50,000.00) and I think they are darned good colts". Affiant says that neither at the time or place indicated nor at any other time or place in the presence of the jury which tried the case or in the presence of any one of said jury did he say anything that could possibly have been distorted into anything like the remark attributed to him in the affidavit of said Staples.

33 Affiant says that what he did say, as hereinbefore by him recited, was not said in such a loud tone of voice as to have been heard by the entire jury, and that he does not believe it was heard by any of them—that he did not intend his remark for the jury or any member of the jury and at the time of saying what was said he did not know the jury or any member of the jury was near.

JOHN E. MADDEN.

Subscribed and sworn to before me at Lexington, Kentucky this January 9th, 1912, by John E. Madden.

LILY S. McCANN,
N. P., F. Co., Ky.

My commission expires March 12th, 1914.

And at a term of court held for said circuit on the 19th day of January, 1912, an order was entered herein, which is in words and figures as follows, viz:

Ordered that this cause be now submitted upon the defendant's motion for a new trial.

And at a term of court held for said circuit on the 27th day of January, 1912, an order was entered herein, which is in words and figures as follows, viz:

Come the plaintiffs and file the joint affidavit of the members of the jury which tried this case and said affidavit is now noted of record.

The Joint Affidavit of the Members of the Jury filed herein on the 27th day of January, 1912, is in words and figures as follows, viz:

34 The undersigned affiants say they were members of the jury which tried the above styled case in this court in December, 1911. That they are informed the defendant has made a motion for a new trial of the case, based in part upon an affidavit of one C. R. Staples, which they have read.

Each of the undersigned says that Mr. John E. Madden did not, as stated in the affidavit of said Staples, remark either in words or substance, in so far as they saw or heard, in a loud or any other tone of voice, or under any circumstances anywhere, say to them or in their hearing "You know that I am struck on Star-Shoot-Blue Danube colts because I sold one for $30,000.00 (or $50,000.00), I think they are darned good colts."

R. W. DAVIS.
RICHARD H. TACKE.
J. ROGER KEARNEY.
THOMAS CARR.
FAYETTE JOHNSTON.
T. F. GANNON.
W. D. RASH.
W. H. BARKLEY.
H. F. WILKERSON.
JAS. T. LOONEY.
I. N. COMBS.
D. R. MESSICK.

Subscribed and sworn to before me by R. W. Davis, Richard H. Tacke, J. Roger Kearney, Thomas Carr, Fayette Johnston, T. F. Gannon, W. D. Rash, W. H. Barkley, H. F. Wilkerson, Jas. T. Looney, I. N. Combs, and D. R. Messick this the 15th day of January, 1912.

Witness my hand as Clerk of the Fayette Circuit Court.

JAMES C. ROGERS, *C. F. Co. C.*,
By GEO. E. DE LONG, *D. C.*

35 And at a term of court held for said circuit on the 3rd day of February, 1912, an order was entered herein, which is in words and figures as follows, viz:

It is now and hereby ordered by the Court that the affidavits of the members of the jury before whom this cause was tried which were tendered by the plaintiffs and offered to be filed herein on January 13, 1912, and were objected to by the defendant, be refused and not permitted to be filed, to which ruling of the Court the plaintiffs then excepted, and on motion of plaintiffs said affidavits are identified with the style of this cause and with the words "Tendered Jan. 13, 1912, Jas. C. Rogers, C. F. C. C., and made part of the record, to which the defendant excepted; thereupon the plaintiffs tendered and offered to file other affidavits of said jurors, to the filing of which the defendant then objected, which objection was overruled by the Court, to which ruling the defendant then excepted, and thereupon said last mentioned affidavits were permitted to be and were filed, to the filing of which the defendant then excepted. The motion to file the affidavits of Jas. E. Madden and D. W. Scott is sustained and they are filed, to which defendant excepted.

Thereupon the Court heard argument by counsel for plaintiffs and defendant respectively upon the motion and grounds for a new trial of this cause filed herein by the defendant, Louisville & Nashville Railroad Company; and also heard said counsel upon the federal question raised by the defendant as to whether the contract in question for the transportation of said colts and fillies mentioned in the petition from Lexington, Kentucky, to Juarez, in the Republic of Mexico, was in violation of the provisions or of any of them of an act of congress of the United States entitled an act to regulate
36 commerce, approved February 4, 1887, as amended by an act approved March 2, 1889, by an act approved February 10, 1891, by an act approved February 8, 1895, by an act approved June 29, 1906, by a joint resolution approved June 30, 1906, by an act approved February 25, 1909, and by an act approved June 8, 1910; and having considered the said motion and grounds for a new trial of this cause, and having also considered the said federal question and being of the opinion that said contract did not and does not violate any of the provisions of said act of congress, the motion is hereby overruled and a new trial is refused.

To which ruling of the court the defendant excepts and prays an appeal to the Court of Appeals of Kentucky, which is granted.

Upon motion of defendant time is given it until May 1, 1912, within which to prepare and tender its bill of exceptions herein.

And afterwards on the 8th day of February, 1912, a supersedeas bond was executed herein which is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
WOODFORD & IRELAND, Appellees.

Upon an Appeal from a Judgment of the Fayette Circuit Court Rendered 22nd Day of December, 1911.

Whereas, Said Appellant Louisville & Nashville Railroad Company has been granted an appeal from the judgment of the Fayette Circuit Court rendered at its December Term, 1911, against
37 it in favor of the Appellees, for the sum of Fifteen Thousand Dollars ($15,000.00) with interest thereon at the rate of 6% per annum from December 22nd, 1911, until paid, and the appellant desires to supersede the execution of the said Judgment above mentioned:

Now, We, Citizens Trust & Guaranty Company of West Virginia, surety, do hereby covenant to and with the Appellees Woodford and Ireland, that the Appellant will pay to the Appellees all costs and damages that may be adjudged against the Appellant on the Appeal, and also that they will satisfy and perform the said Judgment above stated, in case it shall be affirmed, and any Judgment or Order which the Court of Appeals may render, or order to be rendered by the inferior Court, not exceeding in amount or value the Judgment aforesaid. (And also pay all rents, hire or damage, which during the pendency of the Appeal, may accrue on any part of the property of which the Appellees is kept out of possession by reason of the Appeal.)

Witness our hands, this 8th day of February, 1912.

CITIZENS TRUST & GUARANTY COMPANY
OF WEST VIRGINIA,
By R. A. THORNTON, *Its Attorney in Fact.*

Attest:
JAMES C. ROGERS, *C. F. C. C.*
By GEO. E. DE LONG, *D. C.*

No. 13.

Citizens Trust & Guaranty Company of West Virginia, a corporation organized under the laws of the State of West Virginia, and duly authorized to become surety on bonds within the Common-
38 wealth of Kentucky, hereby makes, constitutes and appoints R. A. Thornton of Lexington, Kentucky, its true and lawful attorney, for and in its name to sign, seal and deliver a certain supersedeas bond for the Louisville & Nashville Railroad Company to be given in the Fayette Circuit Court in the case of Woodford & Ireland v. Louisville & Nashville Railroad Company.

Hereby Ratifying and Confirming all and singular the actions of

the said attorney-in-fact in and about the execution and delivery of said bond to all intents and purposes the same as if said bond had been executed by the proper officers of said Guaranty Company at its home office. This power-of-attorney to be attached to, or filed with, said bonds when so executed.

In Testimony Whereof said Citizens Trust & Guaranty Company of West Virginia has caused its corporate name to be signed hereto by W. G. Peterkin, its President, and its corporate seal to be affixed hereto, and attested by J. H. Knapp, its Secretary, this 18th day of October, 1911.

CITIZENS TRUST & GUARANTY COMPANY
[SEAL.] OF WEST VIRGINIA,
By W. G. PETERKIN, *President.*

Attest:
J. H. KNAPP, *Secretary.*

STATE OF WEST VIRGINIA,
Wood County, To-wit:

I, Marshall L. Brown, a Notary Public in and for said county, do certify that W. G. Peterkin personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the President of Citizens Trust & Guaranty Company of West Virginia, the corporation described in the writing above bearing date the 18th day of October, 1911, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that the seal affixed to said writing is the corporate
39 seal of said corporation and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said W. G. Peterkin acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 18th day of October, 1911.

[SEAL.] MARSHALL L. BROWN,
Notary Public in and for Wood County, West Virginia.

My commission expires August 29th, 1917.

And afterwards on the 8th day of February, 1912, a supersedeas was issued herein, which is in words and figures as follows, viz:

Fayette Circuit Court.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WOODFORD AND IRELAND, Appellees.

Supersedeas.

I do certify that an appeal has been granted by the Fayette Circuit Court, from a judgment rendered by said Court on the 22nd day of

December, 1911, in favor of Appellee herein and against Appellant, for Fifteen Thousand Dollars, ($15,000.00) and that a Supersedeas Bond has been executed before me as Clerk of said Court, and Supersedeas ordered to issue on same.

40 Wherefore the Appellee and all others are hereby commanded to stay proceedings on said Judgment above recited.

Witness my hand this 8th day of February, 1912.

Attest.

JAMES C. ROGERS, *C. F. C. C.*

And afterwards on the 25th day of April, 1912, defendant filed motion herein in words and figures as follows, to-wit:

Comes the defendant, Louisville & Nashville Railroad Company, and moves the court to extend the time within which to tender its bill of exceptions herein from May 1st, 1912, until June 15, 1912.

R. A. THORNTON,
Attorney for L. & N. R. R. Co.

And afterwards at a term of Court held for said circuit on the 27th of April, an order was entered herein in words and figures as follows, to-wit:

By consent of plaintiffs, Woodford & Ireland, through their attorneys of record in this cause, the motion of the defendant for an extention of time within which to tender its bill of exceptions in this case until June 15, 1912, is hereby sustained, and by like consent time is given the defendant, Louisville & Nashville Railroad Company, until June 15, 1912, within which to tender its bill of exceptions herein.

41 The defendant having requested further time to tender bill of exceptions, to-wit: until June 15th, 1912, the plaintiffs make no objection and consent thereto and consent to an agreed order giving defendant until June 15th, 1912 to tender bill of exceptions.

TALBOTT & WHITLEY,
Attorneys for Plaintiffs.

And afterwards at a term of court held for said circuit on the 18th day of May, 1912, an order was entered herein in words and figures as follows, to-wit:

By consent of parties, the defendant is now given until the 1st of August, 1912 to prepare and tender Bill of Exceptions herein. The judgment herein having been superseded, this consent upon the part of plaintiffs as to extension of time shall not waive any right they may have to insist upon or require the defendant to prosecute the appeal, from the judgment herein superseded, to the September 1912 term of the Court of Appeals.

O. K.

ROB'T B. FRANKLIN.
ROB'T TALBOTT,
Att'ys — Pl'ffs.

42 And afterwards at a term of Court held for said Circuit on the 20th day of July, 1912, an order was entered herein in words and figures as follows, to-wit:

This day came the defendant, Louisville and Nashville Railroad Company, and tendered and filed its Bill of Exceptions in this action, which being examined and approved by the judge is ordered to be, and is made a part of the record without being spread on the order book.

The Bill of Exceptions filed herein on the 20th day of July, 1912, is in words and figures as follows, to-wit:

Be it remembered that, upon the trial of this action on December 18, 1911, Miss Mary A. Chiles, the official stenographer of this court, was ordered to take full stenographic notes of the testimony and proceedings had and taken upon the trial, and to file in the clerk's office of this court a full and accurate transcript of the same.

43 The case having been stated to the jury by counsel for the plaintiffs and defendant respectively, the plaintiffs then introduced in their behalf the following witnesses, to-wit: Catesby Woodford, John Ireland, Fred L. Gordon, Chester Frakes, Horace Moore, Robert Gaines, William Lewis, Dr. C. D. Seay, P. B. Lillis, Dr. James T. Shannon, Polk Smith, Dr. J. D. Neat, J. N. Camden, John Barbee and John E. Madden. The plaintiffs then rested their evidence in chief.

The defendant, Louisville and Nashville Railroad Company, then introduced in its behalf the following named witnesses, to-wit: J. B. Eastin, Wm. A. Fisher, A. J. Mackey, B. M. Burns, Dr. J. T. Shannon, W. P. Leasor, J. L. Cobb, Mamie Kelly, May Ella Simmons, Ida Wilson, Dan Slavin, Henry Isgrigg, Ed. Lee Sallee, A. H. Veeneman, J. M. Smith, Robert Gaines and J. T. Ireland.

The defendant then rested its case. Thereupon the plaintiffs, Catesby Woodford and John T. Ireland, introduced the following named witnesses in rebuttal, to-wit: Wm. Jenkins, Chas. H. Overly, Richard Salter, L. F. Webb, Jr., Dulin Moss, Catesby Woodford, J. B. Hamilton, Henry Grissom, Pat Lillis, Dr. C. D. Seay, Fred L. Gordon, W. L. Lewis, Robert Gaines, and the plaintiff J. T. Ireland.

The defendant then rested its case, and the plaintiffs then closed their case.

The official stenographer took down and reported in shorthand the testimony of all said witnesses in full, and the respective rulings of the court and other proceedings upon the trial of the case, and made and filed in the clerk's office of this court a full, complete and

44 accurate transcript of said testimony and proceedings together with a carbon duplicate thereof, which said transcript shows in full the testimony of each of said witnesses, and the objections made and the exceptions reserved at the time by the parties, plaintiffs and defendant respectively, to the admission and exclusion of evidence, and rulings of the court thereon, and the avowals of the parties respectively as to what they could prove by such testimony as was excluded by the court; which said transcript has been attested by the judge of the court, and is hereby certified to be correct, and the

same is hereby made a part of this bill of exceptions in all respects as if fully copied herein.

The evidence as set forth in said transcript was all the evidence that was given or offered upon the trial.

Upon the conclusion of all the testimony in the case the defendant, Louisville & Nashville Railroad Company, moved the court to give to the jury the following instructions, to-wit: A. If the jury believe from the evidence, that Chester Frakes and Horace Moore or either of them, the attendants in charge of the horses, failed to use such care in the discharge of his duties as persons of ordinary prudence engaged in the same business usually exercise under like conditions to those in evidence, and that but for such failure on his part, if any, the fire would not have occurred they should find for the defendant.

45 B. If the jury believe from the evidence that the fire in question was caused by the lanterns or either of them in the car, they should find for the defendant.

C. If the jury believe from the evidence that the alleged injuries to the horses in question were caused by a fire inside of the car in which the horses in question and Chester Frakes and Horace Moore, Plaintiffs' attendants in charge of said horses were then being carried, and that such fire was caused by any negligent or careless act or acts on the part of such attendants, and that but for such act or acts, if any, such fire would not have occurred, they should find for the defendant.

C½. The Court instructs the jury that the negligence or carelessness of Chester Frakes and Horace Moore, if either or both of them were negligent or careless in the performance of their duties, or any of them, was the negligence or carelessness of the plaintiffs.

D. If the jury find for the plaintiffs they will fix the damages in such sum as would represent the fair market value at Frankfort, Kentucky, of such of said horses as were killed, and in addition thereto such further sum as will compensate them for the difference, if any, between the value of such other of the horses in question as were injured, *if any, between the value of such other of the horses in question as were injured, if any,* just before they were injured, and their respective values after the extent of their respective injuries were reasonably ascertained.

46 E. Unless the jury believe from the evidence that the fire in question was caused by the negligence of the defendant, that is, by its failure to use such care as persons of ordinary prudence engaged in like business, exercise under similar conditions, they should find for the defendant.

To the giving of each of said instructions the plaintiffs at the time objected, and the court sustained said objections and refused to give to the jury each and all of said instructions, to which rulings of the court as to each of said instructions the said defendant excepted at the time.

Thereupon the court on its own motion gave to the jury the following instructions, marked respectively, 1, 1½, 2, 3, 4, 5, and 6.

1. If the jury believe from the evidence, that the plaintiffs, at

the time, and on the occasion mentioned, shipped from Lexington, Kentucky, the head of horses in question, consigned to Jno. T. Ireland, Juarez, Mexico, by a contract of shipment previously made between the plaintiffs and defendant company, and that at West Frankfort, Kentucky, a station or yard on defendant's line of railway, and while in charge of defendant for transportation, under said contract, the defendant railroad company, or its agents, or servants, or employés struck or bumped the car in which plaintiffs' horses were being hauled against its engine or other cars in a negligent manner, and that the said negligence, if any, on the part of the defendant caused one of the lanterns used by the plaintiffs, or those in attendance, to set fire to the contents of said car, and to injure the plaintiffs' horses, or any of them, they should find for the plaintiffs, unless they should believe from the evidence, that the plaintiffs, or the attendants in charge of said horses,
47 Chester Frakes and Horace Moore, or either of them, were guilty of negligence, as explained in Instruction No. 2.

1½. Unless the jury believe from the evidence, that at the time and on the occasion mentioned, the defendant railroad company, or its agents, servants or employés, struck or bumped the car in which plaintiffs' horses were being hauled against its engine or other cars in a negligent manner, and that the said negligence, if any, on the part of the defendant caused one of the lanterns used by the plaintiffs or those in attendance to set fire to the contents of said car, and to injure the plaintiffs' horses, or any of them, they should find for the defendant.

2. If the jury believe from the evidence, that Chester Frakes and Horace Moore, the attendants in charge of said horses, or either of them, were guilty of negligence while in charge of said horses, and that such negligence, if any, directly or proximately contributed to the injuries to said horses, or any of them, and that but for such negligence, if any, on the part of said persons, or either of them said horses would not have been injured, the jury should find for the defendant, even though they may believe from the evidence, that the defendant, its agents, servants or employés, in charge of the train by which said horses were being transported, were themselves negligent.

3. The negligence of Chester Frakes and Horace Moore, if either or both were negligent, was the negligence of the plaintiffs.
48 4. If the jury find for the plaintiffs, they should find for them such sum in damages as they believe from the evidence, would fairly and reasonably represent the fair market value at Lexington, Kentucky, of the Chestnut colt by Star Shoot, dam, Last Cherry, the chestnut colt, by Star Shoot, dam, Blue Danube, and the bay filly, by Miller, dam, Lady Beth, at the time of the accident, and such further sum in damages as they may believe from the evidence, would fairly and reasonably represent the difference, if any, between the fair market value of the remainder of said horses in the condition they were in immediately before the accident, and their value at such reasonable time after the accident, to the extent of their injuries, if any, traceable directly to the accident

in question, had been, or might have been ascertained, not exceeding in the aggregate $24,525.00, the amount sought in the petition.

5. Negligence, as used in these instructions, is a failure to use ordinary care. Ordinary care, is such care as a person of ordinary prudence would exercise under like, or similar circumstances.

6. Nine or more jurors may make a verdict. If less than the whole concur, the verdict should be signed by those concurring.

To the giving of each of said instructions the parties, plaintiffs and defendant, severally objected and excepted at the time.

The foregoing were all the instructions which were requested by the respective parties, or which were refused or given by the
49 court.

After the rendition of the verdict by the jury and the entry of judgment thereon by the court the defendant, Louisville and Nashville Railroad Company, within three days thereafter, viz: on December 23, 1911, filed in open court its motion in writing and written grounds in support of said motion, and moved the court to set aside said verdict, and judgment and grant it a new trial of this action, and before said motion had been acted upon by the court and while it was still pending, the defendant on January 6, 1912, filed in open court its written additional motion and newly discovered ground in support thereof, and moved the court to set aside said verdict and judgment and grant the defendant a new trial of this action, which said respective motions and grounds are hereby made parts of this bill of exceptions as if fully copied herein.

Afterwards, to-wit: on February 3, 1912, said motions of the defendant for a new trial were overruled, to which said ruling of the court the defendant, Louisville and Nashville Railroad Company, excepted and prayed an appeal to the Court of Appeals which was granted; and time was then given by the court to the defendant within which to tender its bill of exceptions until May 1, 1912, because of the illness and consequent inability of the official stenographer of this court, who had taken the evidence and proceedings of the trial of this action, to transcribe her notes of said evidence and proceedings.

And afterwards, to-wit: on April 27, 1912, the said official stenographer being still unable because of ill health to transcribe her said notes, by consent of the parties, plaintiffs and defendant, time was given by the court to the defendant until July 15, 1912, within which to tender its bill of exceptions.

50 And afterwards, to-wit: on May 18, 1912, it appearing to the court that by reason of her continued ill health the said official stenographer had been and still continued to be unable to transcribe her notes of the evidence and proceedings taken and had upon the trial of this action, and that thereby the defendant had been prevented from having such transcript made out and from filing its bill of exceptions herein, by consent of the parties, plaintiffs and defendant, the court on May 18, 1912, entered a consent order in this cause by which the defendant was given until August 1, 1912, within which to tender its bill of exceptions; the plaintiffs by con-

senting to such order of extension not waiving thereby any right they may have to insist upon or require the defendant to prosecute the appeal, from the judgment herein superseded, to the September 1912 term of the Court of Appeals of Kentucky.

Afterwards, to-wit: on the 20th day of July 1912, the defendant, Louisville and Nashville Railroad Company, tendered into Court this, its bill of exceptions, and the Hon. Charles Kerr, Judge of the Fayette Circuit Court, who presided at said trial, now certifies that the said official transcript of the evidence is a true, accurate, correct and complete copy and transcript of all the evidence herein, and makes said transcript a part of the bill of exceptions as if copied herein; and now certifies this bill of exceptions to be true, accurate and complete, and the same is now ordered to be filed and made a part of the record in this action.

Witness the hand of the Hon. Charles Kerr, Judge of said Court, this 20th day of July, 1912.

CHARLES KERR, *Judge.*

51 STATE OF KENTUCKY,
County of Fayette:

I. James C. Rogers, Clerk of the Fayette Circuit Court, in and for the County and State aforesaid, do hereby certify that the foregoing 47 pages, together with the Official Stenographer's transcript of evidence marked volume- 1 and 2, contain a full, true and complete transcript of the record and proceedings in the case wherein Catesby Woodford and John T. Ireland are plaintiffs, and Louisville and Nashville Railroad Company is defendant, an action lately pending in the aforesaid Court, as the same appears of record and is now on file in my said office.

Witness my hand as Clerk aforesaid this 27th day of July, 1912.

JAMES C. ROGERS, *C. F. C. C.,*
By J. H. CARTER, *D. C.*

52 Fayette Circuit Court.

CATESBY WOODFORD and JOHN IRELAND, Plaintiffs,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Stenographer's Transcript.

LEXINGTON, KY., *December, 18th,* 1911.

This case coming on this day for trial, the jury being duly empaneled and sworn, and the case stated, the plaintiff, WOODFORD, CATESBY, having been duly sworn testified on behalf of the plaintiffs, as follows:

Q. 1. Where do you reside?
A. Bourbon County, Ky., near Paris.
Q. 2. What is your occupation?

A. I am a farmer and breeder of thoroughbred race horses and have been for more than thirty years.

Q. 3. What attention have you given to the subject of breeding and pedigree?

A. The best I was able to give.

Q. 4. During what period of time?

A. More than thirty years.

Q. 5. You are one of the plaintiffs in this action?

A. Yes sir.

53 Q. 6. Who bred and raced the six or seven colts in controversy?

A. I bred them all.

Q. 7. What was the age of these seven colts in the fall of 1910, when this fire occurred in November?

A. They were all yearlings, of course yearlings in the spring; all the ages dated from January, and they would have been two years old in January.

Q. 8. What was the breeding of this first colt, chestnut colt by Star Shoot?

A. He was by Star Shoot out of Last Cherry.

Q. 9. Do you know the pedigree of that colt?

A. Yes, I can run it all the way back; Last Cherry was by Star Dixon out of Cherry Blossom by Powhatan and sister to Patrol.

Q. 10. Have you his pedigree with you?

A. It is in the papers there.

Q. 11. I will ask you to state whether or not this is his pedigree (showing him a paper)?

A. Yes sir.

Q. 12. Will you refresh your recollection from that paper and state what the pedigree of that colt was?

Defendant objects.

Q. 13. Are you able to refresh your recollection by examining that paper as to what the pedigree of that colt is?

A. By examining the paper I see absolutely what it is.

Q. 14. Are you able to refresh your memory from that?

A. I recall the third dam, Atlanta, half sister of Creedmore——

Defendant objects, which objection is sustained by the Court as to the last statement, which is excluded from the consideration of the jury.

Q. 15. The question I asked you was whether or not you could examine that paper and whether or not that refreshed your recollection as to the breeding and pedigree of this colt?

54 A. Yes, I am at all times familiar with the pedigrees, except I can not go all the way back; I think there are twenty crosses given here, and I don't think there is a man probably in Kentucky that could.

Q. 16. Tell the jury as far as you recollect the breeding and pedigree of this colt?

A. By Star Shoot out of Last Cherry, by Star Dixon second dam

Cherry Blossom, third dam Atlanta by Asteroid, and fo-rth dam I do not recollect the name.

Q. 17. As to the second colt—chestnut colt, by Star Shoot dam Blue Danube, tell the jury the breeding of that colt?

A. By Star Shoot out of Blue Danube by Hindoo, Red and Blue by Alarm, Maggie B. B. by Australian, fifth dam by Henry Clay.

Q. 18. Tell the jury if you know the breeding or pedigree of the third colt or bay filly by Miller?

A. She was by Miller son of Hindoo, out of Lady Beth by Merit, and the third dam I don't know, I cannot state, but the fourth dam was Imported by Daniel.

Q. 19. Do you know the breeding or pedigree of this fourth colt by Scribe dam Lady Premier?

A. Yes sir, Lady Premier was by Prince of Monaco, second dam Nihil by Hindoo, third dam Francesca by Imported Leamington, and the next dam Maggie B. B. by Imported Australian, out of Madeline by Boston.

Q. 20. What was the pedigree of the black or brown filly by Ethelbert?

A. Out of Miss Wicks by Orlando, Queen Beth by Hindoo, out of Lady Beth by Imp. The Ill-Used. The colt by Jack Point, dam Lady Vincent by Imp. St. Blaze, second dam Lady Violet, I think by Imp. the Ill-Used, I won't be certain of that.

55 Q. 21. What was the pedigree of the colt by Star Shoot, dam Amy Davenport?

A. Amy Davenport was by Leonitas out of a full sister to Star Dixon; I cannot think of the name of the third dam; Jaconet by Imp. Leamington, Maggie B. B. by Australian known as the Iroquois family, next dam Madeline by Boston.

Q. 22. About when, if at all were these seven colts broken?

A. The first two colts, they were two chestnut colts by Star Shoot out of Last Cherry and Blue Danube were first bridled on the 12th day of August, and the others were bridled probably about the 20th of August.

Q. 23. Did they ever have work or training prior to November 17th, 1910?

A. Yes, they were worked from that time till they left here.

Q. 24. Of the remaining six colts, were they broken at any time before this fire, if so about when?

A. They commenced to be broken about the 20th of August.

Q. 25. Did they ever do any work before the fire?

A. They worked from that time until just before they were shipped the last day or two.

Q. 26. Where did they have this work?

A. On the Lexington track.

Q. 27. Who broke them and trained them?

A. A negro man named Bob Gaines, all but the two first colts.

Q. 28. Who trained and worked them after they were broken?

A. Well, he worked them all the time. Mr. Ireland tried them; some were trained; all that were training were in his charge all the time.

Q. 29. At the time of this fire, November 17th, 1910, who was the owner of these seven colts that were sued for?

A. They had been training probably a month when Mr. Ireland came up here to the races in Lexington, I think in September, I sold him a half interest.

Q. 30. Who was the owner on the 17th day of November, at the time of the fire?

56 A. Mr. Ireland and myself owned them.

Q. 31. What opportunity have you had to be posted in the market of race horses and all horses of this breeding?

A. I have had every opportunity a man could have nearly. I have been selling in New York for fifteen or twenty years and had sales out there, sold in Chicago, and one winter was racing there and sold privately here twenty years ago as Clay & Woodford, when I was in partnership with Col. Clay; I sold about twice up here and it has been twenty years since I have had a sale up here.

Q. 32. Tell the jury in your opinion what was the fair value in the market at Lexington, on November 17th, 1910, of this colt by Star Shoot, dam Last Cherry?

A. I think he was worth $7,500.00.

Q. 33. And the value of the colt by Star Shoot, dam Blue Danube?

A. I think about the same, I couldn't separate the colts they had been worked by the same parties I think; I couldn't separate the values, same values, the breeding and same made the other qualities. Some breedings are more fashionable than the others. The Blue Danube is considered the best family in the United States.

Q. 34. What in your opinion was the value of the colt by Miller, son of Hindoo out of Lady Beth?

A. She worked in twenty-two and three fifths, and I think she may have worked twenty-three or better.

Q. 35. What in your opinion was the value at that same time of this filly by Miller, dam Lady Beth?

A. I said $2,500.00.

Q. 36. What in your opinion was the value at the same time of the filly by Miller, dam Lady Premier?

A. I think about $1,500.00; the other filly could beat her but she was a little more fashionable.

57 Q. 37. And the colt by Ethelbert, dam Miss Wicks?

A. She was bred on the same lines, and I think she was worth about $1,500.00.

Q. 38. What was the value of the colt by Star Shoot, dam Lady Vincent?

A. The same money, about $1,500.00.

Q. The value at the same time of the colt by Star Shoot, dam Amy Davenport?

A. I considered him worth $4,000.00.

Q. 39. After the fire at Frankfort did you have any opportunity to see the four horses that were not killed?

A. Yes sir, they were brought back to Lexington, but they were not being worked any when I saw them. Of course they were kept in the stable; I never have worked them any more.

Q. 40. You didn't have any opportunity to see them in their work after that?

A. No, I don't think after that they were ever worked any more here; I don't think they were on the track again; Mr. Ireland would know about that.

ATTORNEY FOR PLAINTIFF-: If Your Honor please, I want to recall Mr. Woodford to ask him a hypothetical question after the other proof is heard.

Defendant objects.

COURT: I won't pass upon the competency at this time.

COUNSEL FOR DEFENDANT: I withdraw the objection now but will object when the matter comes up.

Cross-examination:

Q. 1. Star Shoot is your horse, I believe?

A. Col. Clay's and mine and Ireland's.

Q. 2. From what I caught you put your values upon those three that were killed chiefly upon their pedigree?

58 A. No sir.

Q. 3. Very largely upon their pedigree?

A. No sir, I put it on the work, on their pedigree, and upon the work they did, the source, and the fact that their dams were producers of stake winners.

Q. 4. These horses were first bridled, if I caught you correctly, about the 20th of August?

A. Yes, the first two were bridled the 12th of August.

Q. 5. By bridled you mean that was the first time they were attempted to be——

A. Ridden.

Q. 6. Now what was done with them for the next week or ten days after they were first bridled?

A. Well, they were worked and trotted around the stables, not on the track, until they got bridle-wise like all colts are generally.

Q. 7. About how long does that require?

A. Well, they were worked one-eighth of a mile within twenty-six days.

Q. 8. They began to work within twenty-six days?

A. They began to work fast enough so that we could hold the watch on them.

Q. 9. When did you first begin to work them?

A. They worked them all the time, some moderately at first, but worked them all the time; every day gave them trotting exercises probably a mile, and then canter a mile.

Q. 10. They were being ridden during that exercise??

A. O, yes, ridden all the time.

Q. 11. That continued about twenty-six days you say?

A. Yes, before we gave them any fast work.

Q. 12. When did you begin to give these colts fast work?

A. On the 8th day of September.

59 Q. 13. What was the character of that work?

A. Well they worked, pulled together as they say with a good weight on them, one hundred and fifteen pounds I think in

eleven and four-fifths seconds in twenty-six days after they were ridden.

Q. 14. Which one was that?

A. Both.

Q. 15. The one out of Last Cherry and Blue Danube?

A. Yes sir.

Q. 16. What was done then, how far did you fresh them?

A. One-eighth of a mile on the 8th day of September.

Q. 17. What time did they make that one-eighth of a mile?

A. In eleven and four-fifths seconds.

Q. 18. Where was that done?

A. At the Lexington Track here.

Q. 19. Who timed them?

A. Mr. Ireland and Mr. Lewis, I think.

Q. 20. You don't know of your own knowledge?

A. I didn't time them, I wasn't standing by looking at their watches, I didn't have the time.

Counsel for Defendant moves the Court to strike from the record the statement that Mr. Woodford made as to the time which these horses made in the freshing of the one-eighth of a mile on the 8th day of September, to which the plaintiffs object.

Q. 21. Did you take the time?

A. No sir, I didn't have the watch in my hand.

Q. 22. Was it stopped?

A. Yes.

Q. 23. But you didn't stop it yourself?

A. No, sir.

60 Q. 24. Therefore you can not speak as to whether or not it was the correct time?

A. I just saw what Mr. Ireland was doing.

Defendant objects.

COURT: That statement that that was the time made is not competent.

Q. 25. That was on the 8th day of September they were breezed,—were they breezed any more after that?

A. Yes, a number of times after that.

Q. 26. Did you see it any more after that?

A. I saw the last breezing they ever had on the 15th of November, just before they were shipped.

Q. 27. Well, where was that done?

A. Same place, Association track.

Q. 28. What was done then?

A. Well, I looked at the timers just the same as I did before without having the watch in my hand.

COURT: You saw the watch where it had been stopped?

A. Yes sir.

COUNSEL FOR DEFENDANT: Did you see the watch after it was stopped:

A. Yes sir.

COURT: He may state that he saw the watch after he saw it but not the time it was done in.

Defendant moves the Court to have the answer stricken out, which motion is sustained by the Court.

Q. 29. Which one was breezed at that time?
A. Both of them; they were together, head and head.
Q. 30. And that was the last time they were ever breezed?
A. No sir.
Q. 31. Had they ever been raced at all?
61 A. No there is no racing in the United States or any other country I ever heard of.
Q. 32. They hadn't been raced?
A. No sir.
Q. 33. They had made no record?
A. No sir, never was one that did make it that I ever heard of.
Q. 34. That is an argument,—my question was whether they had any public record?
A. I am glad to say they had not.
Q. 35. Now that was the first two colts?
A. Yes sir.
Q. 36. If those had not, either one of them been by Star Shoot would you have considered them as valuable?
A. I think they are very much more valuable by being by the most popular horse in the United States.
Q. 37. Then you say their value was very greatly enhanced by being by Star Shoot, in your opinion?
A. Yes sir.
Q. 38. What proportion of the value was it that you attached in the valuation of $7,500.00, what proportion of that value did you attach to pedigree and what to individuality?
A. I didn't say. I never tried to proportion it, but they were two large splendid individuals out of stake producing dams and by a horse that is considered by other people and myself as about the best horse in the United States; so I have to put a great deal by him because he stands first on the winning list and that necessarily makes him that.
Q. 39. My question was what proportion approximately of the value of $7,500.00 did you attach to pedigree and what to individuality?
A. I never figured it out just that way.
Q. 40. Well do so now?
A. The fact that this horse had proved himself game, I think fifty per cent of it——
62 Q. 41. On pedigree?
A. Yes sir.
Q. 42. Did you have a sale in 1910?
A. Yes sir.
Q. 43. Were not a great many of your Star Shoots in that sale?
A. No sir, I didn't have a great many.
Q. 44. Well, didn't you have some, then?
A. Yes, I had all in that sale that were fit to go.

Q. 45. That sale was where?
A. Saratoga.
Q. 46. Do you recall how many Star Shoots you had in that sale?
A. I couldn't call to mind right now; I had a car load altogether, probably ten or twelve.
Q. 47. Did you have a Star Shoot out of Queen Regent, in that sale?
A. Yes sir.

Plaintiffs object which objection is overruled by the Court, to which ruling of the Court plaintiff excepts.

Q. 48. I will ask you whether that colt didn't bring $550.00?
A. Yes sir, it did.
Q. 49. Did you have a colt sold at that sale by Imported Star Shoot, out of Amy Davenport?

Plaintiff objects which objection is overruled by the Court, to which ruling of the Court plaintiff excepts.

A. Yes sir.
Q. 50. What was that sold for?
A. $600.00.
Q. 51. 1910,—that colt was bred when?
A. Bred in 1909, foaled in 1909.
Q. 52. But they were called yearlings?
A. Yes sir, it is the same we are talking about.
63 Q. 53. Now the colt No. 7 on this list is a bay colt by Star Shoot, dam Amy Davenport—what valuation did you put upon that, you put the injury to that colt $5,000.00?
A. I said it was worth $4,000.00 when this accident occurred.
Q. 54. In the petition you put $5,000.00,—I will ask you if that is not exactly the same colt sold at the Saratoga sale which was sold for $600.00?
A. That is the identical colt.
Q. 55. This colt?
A. Yes sir.
Q. 56. Do you recall when that sale was?
A. Yes, on the 11th day of August, 1910.
Q. 57. That colt was bought by J. E. Madden for $600.00?
A. Yes, and he sold him back to me because I thought I wanted him and he was sold for a very small price.
Q. 58. Here is a colt by Imported Star Shoot, dam Last Cherry was that this same colt?
A. Yes sir.
Q. 59. That colt was sold at Saratoga, at public sale in August, 1910, wasn't it?
A. Yes sir.
Q. 60. Do you recall what that colt brought?
A. $1,600.00, I think.
Q. 61. This sale was August 11th?
A. Yes sir.
Q. 62. And it brought $1,600.00, at that sale?
A. Yes sir.

Q. 63. Didn't you sell a colt at that sale by Star Shoot out of Janowood?
A. Yes sir.
Q. 64. Do you recall what that colt brought?
A. I think $1,350.00.

64 COUNSEL FOR PLAINTIFF: We object to all these questions; which objection is overruled by the Court, to this ruling of the Court plaintiffs except.

Q. 65. Did you not sell a bay colt out of Star Shoot by Mercurial?
A. Yes sir.
Q. 66. Do you recall what that brought?
A. I think it brought $1,000.00.
Q. 67. Star Shoot out of Blue Danube?
A. $1,600.00, or $1,650.00.
Q. 68. Is that the same colt?
A. Same colt.
Q. 69. On the 11th day of August when this sale was made, that colt sold for $1,600.00, at public auction at Saratoga?
A. Yes sir.
Q. 70. Had that sale been advertised?
A. Yes sir.
Q. 71. Whose sale was it?
A. Clay & Woodford, and Mr. Hitchcock's and Ben Woodford, my brother, had some, and Wilder & Hill had a lot of them.
Q. 72. Who conducted the sale?
A. The Fasig & Tipton Company.
Q. 73. Didn't you sell a colt by Star Shoot out of Silver Blaze?
A. Yes sir.
Q. 74. What did that sell for?
A. I think about $350.00, or $400.00.
Q. 75. At that same sale?
A. Yes sir.
Q. 76. Did you sell a chestnut colt out of Sister Annette at that sale?
A. Yes sir.
Q. 77. Do you recall what that brought?
A. About the same as the others you just mentioned,—$300.00, or $400.00, I think.

65 Q. 78. By the same stallion, Star Shoot?
A. Yes sir.
Q. 79. And that same year?
—. Yes sir.
Q. 80. You sold a chestnut filly by Star Shoot, out of La Salle?
A. Yes sir.
Q. 81. Do you recall what that brought?
A. About $100.00; she was a deformed filly, I think crippled.
Q. 82. You didn't sell any colt by Miller, in that sale at all?
A. No sir.
Q. 83. You sold one colt by—who is that?
A. Ethelbert, yes I sold one by him, out of Miss Wicks.
Q. 84. What did that bring?

A. $100.00.
Q. 85. Is that the same filly in here (pointing to the list)?
A. Yes sir.
Q. 86. Did you have a sale in 1911, September, at your place?
A. Yes sir; that was since the accident to these other horses, though.
Q. 87. Now in your sale of these, conducted by the Kentucky sales Company, I believe that was, did you not have a chestnut filly by Star Shoot out of Arcadia?
A. Yes sir.
Q. 88. Do you recall what that sold for?
A. I think about $300.00.
Q. 89. Now didn't you have a chestnut filly by Star Shoot, out of Blue Danube?
A. Yes sir.
Q. 90. Do you recall what that sold for?
A. $750.00, and I bought her back for $1,000.00.

The defendant excepts.
COURT: Let the latter part be stricken out.

Q. 91. Did you have a bay filly out Blue Mass?
66 A. Yes sir; she sold for $100.00; she was a badly deformed filly, and it was announced at the sale a sister before sold for $2,200.00.
Q. 92. Didn't you have a brown filly out of Janowood, by Star Shoot in that sale?
A. Yes sir.
Q. 93. Do you recall what that sold for?
A. I think $350.00.
Q. 94. No, $375.00, you are mistaken.
A. I won't miss it very far.
Q. 95. Did you have a chestnut filly by Star Shoot out of Lady Alberta?
A. Yes sir.
Q. 96. Do you know what she sold for?
A. I think $400.00.
Q. 97. Did you have entered in that sale a chestnut filly by Star Shoot out of Lady Vincent?
A. Yes sir.
Q. 98. Do you recall what that sold for?
A. $300.00 or $350.00.
Q. 99. You had entered in that sale a chestnut colt by Star Shoot out of Lady Dixon?
A. Yes sir.
Q. 100. Do you recall what that sold for?
A. $875.
Q. 101. Did you have a chestnut filly by Star Shoot out of Merino?
A. Yes, she sold for about $150.00, I think.
Q. 102. Did you have a chestnut filly out of Nisbett by Star Shoot?

A. Yes sir, $350.00, I think; two thirds of mine were fillies and they are not so popular as horses.

Q. 103. Did you have a chestnut filly by Star Shoot out of Olga Nethersole?

A. Yes, I think that sold for $350.00.

67 Q. 104. Did you have a chestnut colt by Star Shoot out of Queen Regent, sold in that sale?

A. Yes, I think that went for $700.00.

Q. 105. Did you have a chestnut filly by Star Shoot out of Silver Blaze?

A. Yes sir.

Q. 106. Do you recall what that filly brought?

A. I don't know; $300.00, I think.

Q. 107. Wasn't it $275.00?

A. Yes sir.

Q. 108. Now let's get to some of these other stallions——

A. You overlooked the highest price colt I sold there, the one out of Sardine, sold for $1,500.00, and you will see a Sardine sold for $2,100.00, and I bought it.

Q. 109. The chestnut colt by Imported Sardine, what was the price of this?

A. $1,500.00.

Q. 110. Look for a Breakwater filly?

A. Col. Clay sold one there.

Q. 111. I am talking about your sale—I can't go over every man's sale in the United States,—now then, Mr. Woodford, the only work that such of those animals as were sold at your September sale, 1911, did, is that embraced in this list for which you sue, is the work you speak of——

A. O, no, they all worked; you didn't ask me about the work except the three.

Q. 112. I am speaking of those three, that was the work that they had from about the 12th of August to the 20th of August to the time,—but they didn't have any this year, in 1910, the only work that those animals, this chestnut colt by Star Shoot out of

68 Blue Danube, and the other two was the work you speak of?

A. O, they had work every day more or less.

Q. 113. Well take this bay filly by Miller, dam Lady Beth, was she sold?

A. No sir, I never offered her for sale.

Q. 114. Take the bay filly by Miller, dam Lady Premier, did you sell her?

A. No sir.

Q. 115. Black or brown filly by Ethelbert, dam Miss Wicks, when was she sold?

A. 1910, sold at Saratoga, she brought $100.00.

Q. 116. Let's take the one by Jack Point, dam Lady Vincent, was that one sold?

A. No sir, he wasn't sold.

Redirect examination.

Q. 1. You were asked about the sale of some of those colts on the 11th day of August, 1910, at Saratoga and the prices that were paid for them there,—had any of those colts been worked at that time?

A. No sir, only work broken.

Q. 2. In testifying to the large and high value of these colts, now on the day when they were killed, what was your idea for doing that?

A. They had been worked and broken and we found they had good dispositions, nicely broken and sound, and as I say could run fast, fast as we wanted them.

Q. 3. Does good disposition and speed cut any figure in putting a value on a race horse?

A. Cuts nearly all the figure, disposition and speed.

Q. 4. At the time of the death of them in 1910, had they been entered in any race?

69 A. They raced while they were out there until September, then we had a law to stop all races and they were brought here about the November election, and the people who passed that law——

Defendant objects to the argument.

Q. 5. When was that Election, with reference to November 17th, 1910, was that before or after the horses were killed?

A. The law went into effect September 21, and the racing was stopped in the last of August, and then by the next year by that time, that November there was an election pending and then it was held in November and the people who had passed this law, and that caused the Republicans to be badly defeated——

COURT: That argument is not competent.

Q. 6. The question I want to know is what change there was, if any, in the matters you speak of in November, 1910, whether or not there had been any change in the East that affected the price of horses?

A. The races were stopped.

Q. 7. Between August and November, when this sale occurred, was there anything in the East that affected the market?

A. After the 21st, of September we never run another race on that side of the Ohio River.

Q. 8. Then you speak of an election before that that changed the situation, when was that?

A. About the first week in November, 1910.

Q. 9. And that was before the death of these horses on November 17th?

A. Yes sir.

Q. 10. What effect if any did that make in the market price of race horses?

A. It made a very marked condition——

70 Q. 11. August 1910, or 11th of August, 1910, when this sale was had at Saratoga, that was prior to the time this racing act came into effect, the 1st of September?

A. Yes sir.

Q. 12. Was it known to the public generally that this racing would be stopped from the first of September?

A. Everybody knew it.

Q. 13. What effect did that have, if any, on the market?

A. It had the effect then that no Eastern man would buy anything.

Q. 14. Tell the jury whether or not there was any change in the market value of race horses between November 17th, 1910, when these horses were killed, and September, 1911, when this other sale was made that was talked about?

A. Well, the general market is not as good as it would have been a year ago, because we were disappointed in that legislation in New York, and there has never been any very marked difference in really good colts, really good horses have never been so they would not bring good prices, if they proved to be good: the sale this year showed they have sold for $10,000.00, the two-year olds.

Q. 15. You were asked what effect in your mind the pedigree the breeding of these colts had in fixing the prices, and then asked by Mr. Thornton as to certain sales that were made in August, 1910 and in September, 1911.—in addition to these sales he called your attention to other sales of that same breeding that affected your mind in putting the value you did on those horses——

Defendant objects.

Court: Anything by Star Shoot would be competent.

Q. 16. Did you have any other sales of Star Shoots, were
71 there sales of other horses, or out of other horses?

A. I can not think of any other sales but the Star Shoots, just those; but there were sales of other horses by different horses——

Defendant objects which objection is sustained by the Court.

Q. 17. I am speaking of sales of other colts of the same breeding as Mr. Thornton asked you about in this case?

A. You mean the sales since this fire, or within the last year?

Q. 18. The question was whether or not, in addition to the colts that he called your attention to, whether there were any other of the colts and of the same breeding that affected your mind in giving the value of the colts in the sale of 1910?

A. Yes sir, Col. Clay sold one in that sale the very day I bought it myself at $2,100.00.

Counsel for Defendant: He testified to that once.

Q. 19. Was there any other?

A. Well another thing I had an offer for one I had that very day there.

Defendant objects which objection is sustained by the Court, to this ruling of the Court plaintiffs except.

Recross-examination.

Q. 1. It is a fact then, that since the first agitation, and especially since the passage of the Hughes Law in New York State, followed by the action of other states, the values of race horses has deteriorated very decidedly?

A. Yes, there has been a general depression in the business, probably seventy-five per cent has been shipped to foreign lands.

72 Q. 2. Haven't some of the very best thoroughbred establishments, on account of the depression as a result of that adverse legislation, been dispersed?

A. Yes, been sold at more satisfactory prices in Europe and South America.

Q. 3. And there has been a dispersal of some leading thoroughbred establishments?

A. Yes sir, some have moved to Paris.

Q. 4. Argentine, Keene, Haggin and others?

A. Yes been taken over there and sold at good prices.

Redirect examination.

Q. 1. Where a colt is of good breeding and good disposition, having been broken and shows good speed, has the general depression in the market affected the sale of that class of horses?

Defendant objects, which objection is sustained by the Court, to this ruling of the Court plaintiffs except.

IRELAND, JOHN, who having been first duly sworn testified on behalf of the plaintiff- as follows:

Q. 1. You are one of the plaintiffs in this case?

A. Yes sir.

Q. 2. What is your occupation?

A. I own and train horses.

Q. 3. How long have you been in that business?

A. Well, I first had a stable of horses in 1887, I think.

Q. 4. Been at it ever since?

A. No sir, from 1896 to 1906, I didn't have any horses.

73 Q. 5. About how many years altogether have you been in this business?

A. Since 1887, with the exception from 1896 to 1906.

Q. 6. What attention have you paid to the pedigree and breeding of race horses?

A. Well, I used to breed some horses and race them and bred them.

Q. 7. Pay any attention to the subject of pedigree or breeding?

A. Well, yes, I always looked at a horse's pedigree, to see whether they are well bred or not.

Q. 8. Mr. Ireland, when did you take charge of, if at all, of these horses, the list of colts by Star Shoot, dam Last Cherry, and the colt by Star Shoot, dam Blue Danube,—when did you take charge of that work, if at all?

A. I bought them on the 11th of August at Mr. Woodford's sale at Saratoga, and took charge of them that day,—commenced breaking them the next day.

Q. 9. What work did you give those two colts?

A. I gave them just ordinary work that *were* always given yearlings, while we are breaking them.

Q. 10. How long did you work them?

A. Up to about September 1st, I mean the first of—yes, to about the 12th or 14th of September, when the races commenced here, I don't recollect the date exactly.

Q. 11. What happened then?

A. Well, I turned them over to Mr. W. L. Lewis.

Q. 12. Who is Mr. Lewis?

A. W. L. Lewis who owns and trains horses, to take care of them for me until I got ready to take them myself again.

Q. 13. Did he work them?

A. Well, no, he didn't give them any fast work after I turned them over to him.

74 Q. 14. What sort of work did he give them?

A. Just ordinary work, freshed them every few days enough to keep them doing well.

Q. 15. On a track?

A. Yes.

Q. 16. Where?

A. At Lexington.

Q. 17. Did you, before you turned them over to Mr. Lewis, make any trial of the speed of those horses, if so, tell the jury what you did?

A. I breezed those two colts on the 8th of September in eleven and four-fifths, the two Star Shoot colts, the one out of Blue Danube and one out of Last Cherry.

Q. 18. Who timed those colts?

A. Mr. Lewis timed them; Mr. Woodford was standing by me and I timed them myself; I was working them and training them and timed them myself.

Q. 19. Mr. Woodford and Mr. Lewis both present?

A. Yes, and quite a few, I don't recall who was there at the time.

Q. 20. How many days had they been working when they showed that speed?

A. Well, they had not had a bridle on them until the day after I bought them, the 12th of August, and this was on the 8th of September.

Q. 21. Now did you make any other trial of the speed of those two horses before they were destroyed on the 17th of November, 1910, if so tell the jury about it?

A. No, I never did try how fast those two colts could run.

Q. 22. Did you breeze them again after that?

A. O, yes, I breezed them frequently after this before I was to ship them; I notified Mr. Lewis to breeze them, I was going to ship

them but I happened to be there myself, and we breezed
75 them a quarter in twenty-four and two fifths; they carried a weight of probably one hundred and thirty or one hundred and thirty five pounds, I think something like that; very large boys.

Q. 23. How long was that before they were destroyed by the fire?

A. Just a couple of days before they were shipped.

Q. 24. What do you mean by breezing them, explain that please?

A. Well, there is a difference between breezing and trying to see how fast a horse can run; what I mean by breezing those two horses, I told the boys that were on them to gallop slowly to a certain place on the track and when they came to one-eighth pole in that stretch to let them run and pull head and head, not to try to see which one would beat. Of course if we were working for extreme speed we let them set down and ride to see which one can beat.

Q. 25. At the time of the destruction of this colt by Star Shoot, dam Last Cherry, on November 17th, 1910, what was the condition of that colt as to health?

A. Well, the colt was in perfect health, sound.

Q. 26. What was the description of him as to size?

A. He was fifteen and one inch, a large colt, above the average.

Q. 27. How was he as to strength?

A. Well I guess he was as stout as a colt could be of his size.

Q. 28. What about his action?

A. He had good action.

Q. 29. Was he broken at that time, November 17th, if so to what extent?

A. Well, I commenced breaking him on the 12th of August, he was perfectly broken.

Q. 30. What was his disposition?

76 A. Kind, gentle, good disposition.

Q. 31. And the second colt by Star Shoot, dam Blue Danube, tell the jury about the speed of that colt, so far as you learned it before this fire on November 17th?

A. As I just said we worked the two colts together, they were pulled head and head.

Q. 32. The same time you gave on the other colt?

A. They worked head and head, probably the one beat the other one——

Q. 33. This second colt made the same time that the first colt did?

A. Yes, you couldn't separate the time.

Q. 34. How many pounds, about?

A. One of them had, so Mr. Lewis informed me, about one hundred and thirty, and the other about one hundred and thirty-five pounds; two very heavy boys.

Q. 35. What was the height and size of that colt?

A. He was fifteen two.

Q. 36. What was the condition of his health at the time of the destruction by fire?

A. Good.

Q. 37. What is the usual weight on a colt of that age, when you are breezing him?

A. We usually consider them at about one hundred pounds.

Q. 38. And these you stated had one hundred and thirty or one hundred and thirty-five pounds?

A. Yes sir.

Q. 39. What was the state of those colts' health at the time of the destruction by fire,—this colt by Star Shoot, dam, Blue Danube?

A. His health was perfect as far as I knew.

Q. 40. Sound?

A. Yes, perfectly sound.

77 Q. 41. What was the size of this colt?

A. About fifteen two.

Q. 42. What as to bone and strength?

A. Large bone, nice rangy big colt.

Q. 43. What about his action?

A. Action was good, perfect.

Q. 44. Tell the jury whether or not he was well broken at that time?

A. Perfectly broken.

Q. 45. What was his disposition?

A. Good.

Q. 46. Mr. Ireland, when did you begin to work, if at all, the filly by Miller, dam Lady Beth?

A. Well, I didn't work that filly myself at all, we had a man working it here.

Q. 47. You had her worked, did you?

A. Yes sir.

Q. 48. About what time did you have her worked?

A. I think about the 20th of August, Mr. Woodford brought her to Lexington.

Q. 49. Did you breeze her any?

A. Yes, I breezed her several times.

Q. 50. When did you breeze her and what was the result?

A. I breezed her in October, a quarter, with the Lady Premier filly, in twenty-three and two-fifths, she went very handily; Lady Premier I think in twenty-four.

Q. 51. From that time up to the destruction by fire, was any fast time given her?

A. No, only slow work.

Q. 52. Was she on the track here?

A. O, yes, on the track every day.

Q. 53. What was her condition as to health at the time of

78 the destruction by fire?

A. Perfect, as far as I knew.

Q. 54. Was she sound?

A. Yes.

Q. 55. What was her size?

A. She was,—I never had a standard of any of those,—she was

what I would call a compact little filly; she was compactly built, fair size, splendid action and well broken, a good disposition.

Q. 56. The colt—bay filly, by Miller, dam Lady Premier, when did you begin to work her, if at all?

A. The same time as the other filly, I breezed her with this other filly, Lady Beth; both went very handily; Lady Premier went in twenty-four.

Q. 57. What was done with her from that time on to the 17th of November?

A. We just gave them ordinary work, we were keeping them in training; I was going to ship them to Juarez to race that winter, just gave them regular exercise.

Q. 58. What was the condition of her health at the time of this fire, November 17th, 1910?

A. It was good.

Q. 59. Was she sound at that time?

A. Yes sir.

Q. 60. What of her size and action?

A. She was a good-sized filly, taller than the other mare.

Q. 61. Was she well broken at that time?

A. Yes sir.

Q. 62. What was her disposition?

A. Good.

Q. 63. When did you begin to work, if at all, the filly by Ethelbert, dam Miss Wicks?

79 A. I don't recall now whether she went with the first two, or whether she went with the other bunch of horses; it was either the same time I did the two colts, or the same time we did those others.

Q. 64. Did you breeze that colt?

A. Yes.

Q. 65. When?

A. Along in October.

Q. 66. What was the result?

A. I breezed her either a quarter in twenty-three and three-fifths or twenty-three and four-fifths, I couldn't say without looking it up.

Q. 67. What was done with her from that time up to November 17th?

A. Just gave her ordinary work after that.

Q. 68. Keep her on the track working?

A. Yes, kept her on the track working all the time.

Q. 69. At the time of this fire, November 17th, 1910, and just before that fire, what was the state of her health?

A. Good.

Q. 70. Was she sound?

A. Sound.

Q. 71. What as to size?

A. She was fair size.

Q. 72. Action?

A. Good.

Q. 73. Well broken?

A. Well broken.
Q. 74. And as to disposition what?
A. Good disposition.
Q. 75. The colt by Jack Point, dam Lady Vincent, did you work that colt any before it was injured November 17th?
80 A. Yes, I worked him a quarter in twenty-three and three-fifths.
Q. 76. When did you begin working on him?
A. The 20th of August.
Q. 77. When did you breeze him?
A. October some time I couldn't tell the date.
Q. 78. What time did you say?
A. Twenty-three and three fifths.
Q. 79. What did you do with him after that up to the time of this fire?
A. Just gave him ordinary work after that I was trying him to see whether he had speed or not. He showed me he had speed.
Q. 80. What was the condition of his health at the time of this fire?
A. Good.
Q 81. Was he sound?
A. Yes.
Q. 82. What as to size?
A. He was good size.
Q. 83. What as to strength?
A. Well, I don't know as to strength, he was a stout built colt.
Q. 84. What of his action?
A. Good action.
Q. 85. Well broken?
A. Well broken.
Q. 86. What was his disposition?
A. Good.
Q. 87. Did you work a colt by Star Shoot, dam Amy Davenport before this fire, if so, when did you begin to work that colt?
81 A. I worked him at the same time I worked the Jack Point colt.
Q. 88. Did you breeze him any?
A. I breezed him a quarter in twenty-three and two-fifths.
Q. 89. Did you breeze him?
A. Yes sir.
Q. 90. What did you do with him after that until the fire?
A. I didn't do any more fast work with him.
Q. 91. Was he kept on the track?
A. Yes.
Q. 92. What was that colt's condition as to health on November 17th, the time of the fire?
A. Good.
Q. 93. Was he sound?
A. Yes.
Q. 94. What was his size?
A. He was a good sized colt.

Q. 95. Strength and action?
A. Good.
Q. 96. What was his disposition?
A. Good disposition.
Q. 97. Was he well broken?
A. Well broken.
Q. 98. As to these horses you speak of, in giving them heavy work, you kept all of those horses at work and on the track from the time you broke them up to November 17th, did you?
A. Yes sir.
Q. 99. On the 17th of November, 1910, who was the owner of these seven colts that are sued for in this petition?
A. Mr. Catesby Woodford and myself.
Q. 100. Who looked after the shipment of those colts on this occasion?
A. Myself and Mr. Lewis.
82 Q. 101. Tell the jury in your own way what occurred?
A. Well, I came up here and I ordered a car from Latonia, I had some horses to ship from Latonia to Juarez on the special that was coming from there. I had this car here and had this other car to meet the special at Louisville, and I came up here myself and arranged about the shipping of the horses. I found I couldn't load the horses in time to catch the train that night and I got Mr. W. L. Lewis to superintend loading these horses out at the shoot, at the Race Track. I stayed there until probably about a quarter to five; I gave myself about time to get to the L. & N. freight office in a taxi cab to bill out those horses and left them loading. When I left the shoot, I went down to the freight office, billed them out, paid the freight on them and caught the train that leaves here about 5:30.
Q. 102. What do you mean by saying you billed them out?
A. I went down there and they made out the bill of lading, and I paid it and paid the freight on them.
Q. 103. You signed the bill of lading?
A. Yes sir.
Q. 104. Where was that signed?
A. Down at the freight depot.
Q. 105. Did you have any discussion at all with the railroad people as to the value of those horses, anything said on that subject?
A. None whatever.
Q. 106. You let them understand they were racing horses?
A. O, yes, they were billed out as race horses; I suppose they were billed that way.
Q. 107. Did you read over the bill of lading before you signed it?
83 A. I haven't read one for years, and I have been shipping horses more or less for twenty years.
Q. 108. Did you read this particular one?
A. No sir.
Q. 109. Where was that bill of lading delivered to you?
A. My recollection is I left it with the agent there and told them to give — to the boy on the car.

Q. 110. When did you get it?

A. The next day at Frankfort probably that is the way I recollect it.

Q. 111. Before you left on the car that afternoon, tell what, if anything, was done when you were present with reference to preparing this car to load the horses on it?

A. Well, the car was put——

COUNSEL FOR DEFENDANT: Was it done in your presence?

A. O, no the car was already put.

Q. 112. I am asking you to tell what you saw yourself?

A. I saw the car at the track all ready to be loaded.

Q. 113. What was its condition when you saw it?

A. It was in good condition then.

Q. 114. What preparation had been made for taking those horses, was it stalled off at that time?

A. Yes; and Arms and Palace Horse Car, and they had installed it as I directed them, two abreast; eight horses and two abreast and bedded with saw dust.

Q. 115. Tell the jury how this car was stalled off?

A. Two sides abreast the full length of the car, two stalls at each end of the car and four stalls in the center of the car and they all faced the aisle, and these horses are tied with their halters to the aisle.

84 Q. 116. And they have their heads to the aisle?

A. Yes, at each end of the car.

Q. 117. How were the lamps fixed in the car, if they were fixed before you left?

A. They were not fixed before I left; I told my foreman how to fix them as we always had when we shipped horses?

Q. 118. Had any of the lamps been purchased for that purpose before you left?

A. Yes, we sent to Mr. Mahoney's grocery to get two new lamps.

Q. 119. Were they there before you left?

A. I sent the boy after them, and I think he was either coming or just there before I left.

Q. 120. Did you pay any attention to the lamps yourself, notice the kind they were?

A. Yes, an ordinary stable lantern we always used; I have bought a hundred of them the same character of lanter-s we always used around the stable.

Q. 121. Have you had any experience in shipping race horses over the railroad?

A. Yes sir.

Q. 122. What was the character of those lanter-s which they had ordinarily used?

A. Kind I have been using for a good many years.

Q. 123. Is it usual to have lanterns in the cars when shipping?

A. Yes sir.

Q. 124. Is there any necessity?

A. Yes sir, if a horse gets down it is necessary to have a light in their.

Adjourned to two o'clock.

Met pursuant to adjournment.

85 Q. 125. Did you see these horses the night of November 17th, after the fire, if so, how soon?

A. I saw them the next morning; that morning I went to Frankfort on what we used to call the Midland, I came from Cincinnati and came over from Georgetown the next morning.

Q. 125. Were the horses all living at that time?

A. No, two of them had been destroyed at that time.

Q. 126. What was the condition of the third one?

A. The Lady Beth filly was in very bad shape.

Q. 127. Was she destroyed before you arrived there?

A. She was destroyed after I left there; I didn't see her destroyed, but the Doctors destroyed her.

Q. 128. What was the condition of the next colt, the bay filly, by Miller, dam Lady Premier?

A. She was very badly burned around the nostrils, foretop and ears and over her back.

Q. 129. What was the condition of the brown or black filly by Ethelbert, dam Miss Wicks?

A. Burned about the ears, foretop; spot or two on the side.

Q. 130. What was the condition of the Jack Point colt, dam Lady Vincent?

A. Burned about the same way.

Q. 131. And the colt of Star Shoot, out of Amy Davenport?

A. Burned about the foretop, singed on the ears.

Q. 132. What was the condition of all four of those colts at that time with reference to their nervous state?

A. Well, they were very nervous and excitable.

Q. 133. Did you do anything over there with this colt—filly by Miller, dam Lady Premier, did you handle her any after that and if so, when did you begin and what did you do with her?

86 A. I shipped them to Jaurez about, I think the 4th or 5th of December, I couldn't say the exact date, but you could find it from the express office, and put her in training as soon as her back got well enough to put a saddle on it; probably a month after that.

Q. 134. State whether or not there was any change in her disposition or temperament, after that, and if so in what particular?

A. She has always been foolish about the head, been nervous after that.

Q. 135. Tell more particularly what you mean by being nervous when you worked her?

A. Well, I mean after I could work her, she was always excited and nervous.

Q. 136. Has that nervousness quieted up to the present time; has she gotten over that?

A. No, I worked her about two days before I left Jaurez, and that was last Saturday,—Saturday a week. I got here the day before the inaugeration, the Saturday previous to that I left Jaurez; you can fix it that way. I worked this filly the day I left Jaurez, and she pulled the boy pretty good along but she turned at the gate and run off down from the stables before he could get her under control again.

Q. 137. What about the black and brown filly by Ethelbert, dam Miss Wicks, did you do anything with that colt after this fire?

A. Yes, she has been under training; I still have her at Jaurez; I have run her several times but she never won a race she works good enough but seems to be nervous and exciteable and does not run good in a race does not come up to her work, but she
87 works very nicely by herself and probably with one horse, but when I put her in the race she runs bad and seems to stop; I don't know what the matter is with her, I guess seems to be afraid——

Defendant objects and moves the Court to have that stricken from the conisderation of the jury.

COURT: Let it be done.

Q. 138. Do you know what the presence of a crowd has on her?

A. I think that with the noise and excitement of the crowd,—I don't think she runs good for that reason.

Q. 139. How many races have you tried her in?

A. I suppose five or six, I couldn't say for sure.

Q. 140. Has she run up to her work in any of those races?

A. Never has.

Q. 141. What about the colt by Jack Point, dam Lady Vincent, did you do anything with that colt?

A. Yes, I took him to Jaurez, and I raced him there, he run a little better than this other little filly; he has been second twice and third once with a very ordinary load; that horse has never run up to his form——

COUNSEL FOR DEFENDANT: How many races did you put him in?

A. I suppose seven or eight times; the record would show.

Q. 142. You say he didn't work up to his form?

A. The way he worked.

Q. 143. By form do you mean speed?

A. Yes sir.

Q. 144. Did you observe a nervousness about his work, in his form and temperament?

A. O, yes, always been nervous and exciteable.

Q. 145. As to the colt Star Shoot out of Amy Davenport, did you do anything with that colt?

A. Yes, the same thing applied to him as to the two others, I run him three times at Jaurez in the latter part of the
88 winter, probably in March I think, but I am not positive, I started him once in Kentucky and he worked good enough for me to start him in stakes there and I started him in three stakes there but he never run up to his work there.

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Q. 146. What change, if any, did you observe in him after the fire?

A. These colts were all the same; they were all foolish about the head, nervous on the track.

Q. 147. How about racing in a crowd?

A. The same thing applies to racing.

Q. 148. To all of them?

A. Yes sir.

Q. 149. When you say the same thing applies to all of them, what do you mean?

A. I mean they all showed this nervousness and are foolish about the head.

Q. 150. And with reference to their working up to their speed in racing, what do you mean by that?

A. They have never run up to their speed in racing.

Q. 151. As to the sale at Saratoga, August 11th, 1910, tell the jury whether or not there were any conditions existing at that time to affect the market, if so, what?

A. Just at that time the racing season was to close in New York on the 1st of September, on account of the passage of what we call the Hughes Bill there, and of course values were down.

Q. 152. Was there any change in these conditions between that date and the date of this fire, November 17, 1910, if so what was that change?

A. After the election of Mr. Dix, under his administration values went up.

Q. 153. That was prior to November 17th?

89 A. Yes sir.

Q. 154. Mr. Ireland, in your opinion what was the fair market value on November 17, 1910, of this chestnut colt by Star Shoot, dam Last Cherry, that was killed?

A. I valued him at $8,000.00.

Q. 155. And the chestnut colt by Star Shoot dam Blue Danube?

A. I put him at $7,500.00.

Q. 156. That was also killed was it?

A. Yes sir.

Q. 157. And that bay filly by Miller, dam Lady Beth?

A. $2,500.00.

Q. 158. What, Mr. Ireland, in your opinion, made these Star Shoot colts valuable?

A. Well, their breeding too on account of the way they worked for me.

Q. 159. In making this estimate as to the value, do you know of any sales of this breed of horses?

A. I bought those two colts.

Q. 160. I mean do you know of any sales before this time of horses of this same breeding?

A. O, yes, I have been seeing them sold for years.

Q. 161. What sort of prices?

A. They always brought good prices.

Q. 162. Tell what they were.

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A. They brought anywhere from——

Defendant objects.

Q. 163. I am inquiring about the colts of this same breeding and pedigree.

COURT: I stated this morning that I wasn't going into and take up all the Star Shoots but as to the breeding of Col. Zeke Clay's I ruled it was competent.

90 Q. 164. Well I will take the colt out of Bonnie Blue?

A. Mr. Woodford sold several colts this year if I am not mistaken, one of them brought $10,000.00; Bonnie Blue is a full sister to Blue Danube——

Defendant objects.

Q. 165. The sale must be confined to about the time 1910—the sale you speak of from that time up to the present time?

COURT: Is the colt you are speaking of by Star Shoot?

A. Yes sir.

COURT: And when was it sold?

A. I don't remember these sales, I would have to ask Mr. Woodford.

COURT: How old were they?

A. Yearlings.

COURT: If it was about December, 1910, sale I think it would be competent.

Q. 166. Do you know the date of that sale?

A. No sir, I know this colt sold at public sale at $10,000.00.

COUNSEL FOR DEFENDANT: At what time?

A. I don't remember.

Defendant objects which objection is sustained by the Court.

Q. 167. We will take the mare Ocean Point by Star Shoot that Clay Bros. raced——

Defendant objects which objection is sustained by the Court.

Q. 168. The bay filly by Miller, dam Lady Premier, what in your opinion was the fair market value of her on November 17, 1910 before the fire?

A. I put her at $1,200.00.

Q. 169. That change that you observed in her disposition or temperament or condition after that which you described to the jury—I will get you to tell the jury what in your opinion

91 was her value after that fire?

A. She has not been worth anything since; she has been dead expense to me ever since.

Q. 170. The black or brown filly by Ethelbert, dam Miss Wicks?

A. I would like to say I have had this mare in training all the time; she has not been worth anything to me; she has never raced a race.

Q. 171. The black or brown filly of Ethelbert, dam Miss Wicks, with the injuries you have described and with the defects you have

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spoken of about her and her nervous condition, what in your opinion was her value after that fire?

A. I put her at $1,000.00.

Q. 172. Before or after?

A. Before.

Q. 173. What after?

A. $500.00.

Q. 174. What about Jack Point dam Lady Vincent with the injuries you have described to him and the affect on the temperament or nervous system, what in your opinion was his value in the market after the fire?

A. I didn't make any valuation before the fire.

Q. 175. Yes, I remember but I stated it now before.

A. I valued it at $1,500.00 and after the fire $800.00.

Q. 176. The colt Star Shoot, Dam Amy Davenport, with the injury you have described, and the effect on her nervous system, what in your opinion was her value after the fire?

A. That colt I valued at $5,000.00, and after the fire she was worth $1,750.00.

Q. 177. On November 17, 1910, or rather prior to that time, were any of those colts entered in any racing stakes?

A. The Last Cherry colt and Blue Danube colt were en-
92 tered in a number of events in the country; probably $100,000.00 worth of stakes, and the others were entered into the same class; the Beth filly and the Star Shoot Amy Davenport were also entered.

Q. 178. Any of the others you recall?

A. I entered the Lady Premier filly I think in the Oaks at Louisville and probably in a stake or two at Jaurez; also a stake or two at Louisville in the spring, my recollection?

Q. 179. Will you examine these photographs and state if you know what they are?

A. Well, yes, the heads of Lady Premier——

Defendant objects.

Q. 180. What did you say the photograph of the head of the Lady Premier filly?

Defendant objects.

Q. 181. I will get you to state whether that is a fair likeness or representation of her condition after the fire?

Defendant objects which objection is sustained by the Court.

Q. 182. Do you know when that photograph was taken with reference to the fire?

A. Taken after the horses were shipped back to Lexington.

COUNSEL FOR DEFENDANT: Were you present when they were taken?

A. Yes sir.

Q. 183. Do you remember about how long after?

A. I couldn't say for sure, a day or two after; I don't know just what date.

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Q. 184. Could you state whether or not it is a fair representation or likeness of the condition of that animal at that time?
A. What shows her head, yes sir.

93 Plaintiff here offers photograph in evidence, to which the defendant objects, which objection is sustained by the Court.

Cross-examination.

Q. 1. I believe the colt, Miss Wicks, the colt by Ethelbert was named Miss Wicks?
A. No sir, Ethel Wicks.
Q. 2. Who owned that colt?
A. Mr. Woodford and myself.
Q. 3. Did you buy that colt at a sale?
A. Yes, I bought her at Saratoga.
Q. 4. Do you recall what you paid for her?
A. $100.00.
Q. 5. That is the same colt you have been talking about here as the Ethelbert filly?
A. Yes sir.
Q. 6. And that is one of the animals that was injured in this fire?
A. Yes sir.
Q. 7. When was that sale made at which you paid $100.00?
A. On the 11th of August.
Q. 8. Was it a public sale?
A. Yes sir.
Q. 9. By whom was the sale made?
A. By the Fasig & Tipton Company.
Q. 10. What is the Fasig & Tipton Company?
A. Sales for horses.
Q. 11. Had the sales of that stock been catalogued or advertised?
A. Yes sir.
Q. 12. Did you buy any other of those animals at that time?

94 A. Yes sir.
Q. 13. Which one?
A. The Last Cherry and the Blue Danube colts.
Q. 14. Do you recall what you paid for the colt by Star Shoot out of Last Cherry?
A. $1,600.00.
Q. 15. At the same sale?
A. Yes sir.
Q. 16. What was the other one you bought?
A. Blue Danube.
Q. 17. That is one in controversy here?
A. Yes sir.
Q. 18. That is one of the colts that was destroyed?
A. Yes sir.
Q. 19. Do you remember what you paid for the Blue Danube?
A. $1,600.00.
Q. 20. At that same sale at Saratoga?
A. Yes sir.

Q. 21. On the 11th day of August, 1910?
A. Yes sir.
Q. 22. Those were the three head that were bought by you at that sale?
A. Yes sir.
Q. 23. Now what was done when you brought them on here?
A. I worked them or put them in training the next day after I bought them, and broke them at Saratoga.
Q. 24. What was the first thing you did in the way of working them?
A. Broke them.
95 Q. 25. How did you do that?
A. Put the bridle on them, led them around, put the boy on them.
Q. 26. How many days did that take?
A. I suppose took four or five days.
Q. 27. When did you bring them to the track?
A. They were on the track at the time.
Q. 28. From Saratoga here?
A. O, that was down at Saratoga.
Q. 29. That was down at Saratoga was it?
A. Yes, they were racing at Saratoga.
Q. 30. When did you bring them from Saratoga to Lexington?
A. I think we left there about the last day of August, I couldn't say the exact date.
Q. 31. What was done with them between the times that you started with them after the sale on the 11th of August, and the time you started to bring them from Saratoga to Lexington?
A. Why we worked them, just gave them their regular work as we do all horses.
Q. 32. Describe to the jury—you didn't put them in harness or wagon?
A. We put boys on them and worked them every day like any other horses in training.
Q. 33. Then how long did you keep them training at Saratoga?
A. Until about the first of September, either the last day of August or the first day of September.
Q. 34. Then they were brought here?
A. Yes sir.
Q. 35. Do you recall what time they reached Lexington?
A. Well, I forget what the run is from Saratoga here.
Q. 36. Well, as near as you can?
96 A. Well, I suppose about thirty-six hours.
Q. 37. Brought directly here to Lexington?
A. Yes sir.
Q. 38. Do you know when you began to work them at Lexington?
A. Right away.
Q. 39. About what time in September would that be?
A. That would be right about the first or second of September; they went in training every day.
Q. 40. What was done with them down here?

A. I worked one-eighth in twelve and one fifth, and then breezed them one-eighth in eleven and four-fifths, head and head.

Q. 41. When was that breezing made of which Mr. Woodford spoke this morning when you timed them?

A. I think on the 8th of September.

Q. 42. What was the time, take the first one, that is the Last Cherry colt?

A. Eleven and four-fifths.

Q. 43. What distance?

A. One eighth of a mile.

Q. 44. What other one of those colts did you time on that date?

A. The Blue Danube colt. We worked them head and head.

Q. 45. Do you remember the time?

A. The same time; you couldn't split your watch on them; one of them probably beat the other only a nose.

Q. 46. Did you work the other one, the third one that is called the Miller colt?

A. I worked her later; I remember breezing her that day.

Q. 47. When did you work the Miller filly?

A. Along in October, probably.

97 Q. 48. What had been done with her in the meantime?

A. She was in like training, same as the other horses.

Q. 49. Did you run them a full mile out here at all?

A. No, indeed.

Q. 50. None of them run a half mile?

A. Or half mile; never heard of yearlings running a full mile.

Q. 51. The question was as to these?

A. No sir.

Q. 52. When you breezed the Miller colt, what was the result did you time it?

A. Twenty-three and two fifths in a quarter of a mile.

Q. 53. Do you recall—do you call that fast time.

A. I call that good time, the way she did it.

Q. 54. Do you call twenty-three and two fifths fast time on that track?

A. Very good, it is owing to the condition of your track.

Q. 55. Did you know of the colt coming up there in twenty-two and one-fourth?

A. I heard of a colt coming in twenty-two and a fraction.

Q. 56. And you have heard of a number go in twenty-two as yearlings, haven't you?

A. I never heard of a yearling running in twenty-two.

Q. 57. Or a small fraction?

A. I have worked them as good as twenty-two and four fifths myself, about as good as I ever worked one on the Lexington track.

Q. 58. How much of that valuation that you put upon the first colt, the Last Cherry Colt, did you apportion to pedigree?

A. I couldn't undertake to separate the difference between the pedigree and size; I couldn't figure it that way.

98 Q. 59. You can't tell how much you gave to pedigree and how much to individuality?

A. No.

Q. 60. You won't undertake to do that?
A. No sir.
Q. 61. Were you at the Woodford sale on the 11th of September?
A. Yes sir.
Q. 62. I wish you would look at the Daily Racing Form at Catesby Woodford's sale, look at the Star Shoots there and see if you can recall these as the animals that were sold?
A. Yes sir.
Q. 63. And the prices as are set out there?
A. They are correct as far as I know.

Defendant here offers in evidence so much of that paper as contains and as he shows is correct of the Star Shoot sale on that occasion.

COURT: Let it be done.

The report of the sale of Catesby Woodford's yearlings at Mr. Woodford's farm in the County of Bourbon, giving all the sales of the Star Shoot colts and fillies made at that time, with the prices respectively attached to each is given to the witness for examination, and he says as he recalls they are correct; and so much of that paper as has been stated was offered by the defendant and the counsel for plaintiffs then admit the entire paper ought to be in, which was put in by agreement. Said paper is marked "I, 1," and is as follows:

"The sale of yearlings belonging to Catesby Woodford of Raceland Stud, Col. E. F. Clay of Runnymede Stud, and those of Clay Bros., took place at Raceland Stud this morning under the management of the Kentucky Sales Company. Forty-three head sold for $15,505, an average of $360. The sale was well attended and bidding on the best yearlings was prompt and spirited, Henry McDaniel acting presumably for R. L. Thomas, secured the pick of the lot in a half sister to Running Water for $2,100, while John S. Ward se-
99 cured an excellent looking colt by Star Shoot—Sardine for $1500. All breeders and trainers of the blue grass region were on hand and several from other states, including H. T. Oxnard, C. J. Quinn, A. B. Hancock, Peter Wimmer, John Walters and Fred Johnson. The sale, considering present conditions, was regarded as satisfactory in its results.

The summary of the sale follows:

Black or brown filly by Star Shoot—Breakwater, Henry McDaniel	$2,100
Chestnut filly by Star Shoot—Sardine; J. S. Ward	1,500
Chestnut colt by Star Shoot, High Degree; J. E. Madden	1,000
Chestnut colt by Star Shoot—Lizzie Dixon; John Walters	875
Chestnut colt by Star Shoot, Real Lace; Henry McDaniel	775
Chestnut filly by Star Shoot, Blue Danube; R. G. Holloway	750
Chestnut colt by Star Shoot, Queen Regent; J. C. Milam	700
Bay gelding by Star Shoot, Kentucky Belle, II; John Walters	650
Chestnut colt by Stalwart, Thirty-Third; William Wallace	600

Bay colt by Star Shoot—Estelle Whitney; Gallagher Bros.. 575
Chestnut filly by Star Shoot—Lady Alberta; Lon Jones.... 400
Bay or brown filly by Star Shoot, Janowood; J. P. Ross.... 375
Chestnut filly by Star Shoot, Olga Nethersole; J. C. Milam.. 350
Chestnut filly by Star Shott—Nisbat; J. E. Madden..... 350
Chestnut filly by Star Shoot, Arcadia; J. S. Ward.. 300
100 Brown filly by Ogden—Queen Dixon; J. W. May.. 300
Chestnut filly by Star Shoot—Lady Vincent; J. P. Ross 300
Bay colt by Star Shoot—Lyndall; Col. M. Young..... 275
Chestnut filly by Star Shoot—Silver Blaze; Charles Worthington 275
Bay filly by The Scribe—Lady Premier; J. J. McCafferty. 250
Black or brown colt by Star Shoot—Maribel; Henry McDaniel 250
Brown colt by Orlando—Frankness; Walter Grafer..... 235
Bay colt by Star Shoot—Estelle Whitney; J. W. May.... 200
Bay filly by Star Shoot—Semper d'Or; J. W. May..... 200
Chestnut filly by Star Shoot—Mariana; W. L. Lewis..... 150
Bay filly by Orlando—Blackheart; Robert Campbell..... 150
Chestnut filly by Star Shoot—Frances Hindoo; Henry McDaniel 150
Brown colt by Miller—Marie Decca; Fred Luzader..... 150
Brown filly by Yankee or The Scribe—Janice II; William Steele 100
Bay filly by Knight Errant—Marie Francis; J. E. Madden. 100
Chestnut colt by Orlando—Vassari; William Steele..... 100
Bay filly by Ormicant—Quality; William Steele..... 95
Bay or brown filly by Orlando—Tactfully; William Steele 90
Bay filly by Star Shoot—Blue Bass; William Steele..... 90
Brown filly by Miller—Homebody; William Steele..... 90
Bal filly by Miller—Magna Stella; W. H. Whalley..... 85
Bay or brown filly by Migraine—Deceptive Angle; J. A. Wagner 80
Bay filly by Delhi—Outcome; William Steele..... 75
Chestnut filly by Orlando—Kismet; W. H. Whalley..... 75
Brown colt by Kilkerran—Mindful; J. E. Madden..... 75
Bay colt by Orlando—Grievance; W. H. Whalley..... 60
Bay filly by Scintillant II—Single Shot; D. S. Henry..... 60
Bay colt by Star Shoot—Espero; D. S. Henry..... 60

101 Total for 43 head $15,505
Average per head 360

Q. 64. I believe you have stated that you engaged an Arms Palace car for the transportation of the horses in question in this suit to Juarez?

A. Yes sir.

Q. 65. Personally?

A. Yes sir.

Q. 66. And you made a contract for the shipment of this stock in that car?

A. Yes sir.

Q. 67. I will ask you to state whether this is your signature to that contract?

A. Yes, sir; I ordered the car through Mr. Elrod at Latonia, who was getting up a special; one car at Latonia and one car up here.

Q. 68. Where did you first see that car?

A. First at the Race Track; the lot adjoining the Race Track at Lexington, Ky.

Q. 69. What time of day do you recall you saw it?

A. I couldn't say probably about two o'clock, somewhere along in the afternoon; I came up here from Latonia to supervise the shipment of those horses.

Q. 70. Was the car sitting before you?

A. Yes sir.

Q. 71. Did you see the car at any time subsequent to that day?

A. I saw it just before we loaded the horses.

Q. 72. About what hour was that?

A. I think I left there about probably a quarter to five.

Q. 73. Did you see the car start from there?

A. O, no, no sir the horses hadn't been finished loading when I left.

102 Q. 74. What railroad company had that car in charge at the Race Track, do you know?

A. I only know what they say, that the switch belongs to the C. & O. I think.

Q. 75. Then that was transported down to where?

A. I suppose to the yards of the L. & N.

Q. 76. Did you see the car down on any of the L. & N. tracks?

A. No sir.

Q. 77. When did you go down for the purpose of closing this contract for transportation?

A. I went down immediately from the track in a taxicab to the depot, paid the freight on it, and signed the contract.

Q. 78. Do you know what hour that was?

A. Must have been five o'clock; I was going to take that train.

Q. 79. Did you see the car any more after that?

A. Not until I saw it at Frankfort the next day.

Q. 80. When did you first see it?

A. At Frankfort, I suppose about twelve o'clock, may be one o'clock.

Q. 81. Just draw a little diagram the way you said those stalls were fixed there?

(Which witness does.)

Q. 82. Explain to the jury how that is?

A. This car,—this is the outside; these are the car doors; here runs two end stalls towards Lexington; there were horses in each end and in each of those stalls; and a horse in this stall, their heads all to

the aisle; this is the aisle between the doors; the horses are standing two and two.

Q. 83. Which way are the heads?

A. All pointing to the aisle.

Q. 84. Towards the middle aisle?

A. No, these two horses are riding backward, their heads to this aisle, and these two horses with their heads to the aisle.

103 COUNSEL FOR DEFENDANT: Just write it.

Q. 85. I understand you to say then—we have marked this diagram one end Louisville and that is the end pointing towards Louisville, the one attached to the engine?

A. Yes sir.

Q. 86. And the other end Lexington, and the square figures there is the outlines of the car?

A. Yes sir.

Q. 87. These spaces marked stalls at the Louisville end, how many were there?

A. Two.

Q. 88. And the horses in each?

A. Yes.

Q. 89. And they were facing to the aisle?

A. Yes sir.

Q. 90. It would make them look east from where they were—in going past that aisle, we have two stalls on the south side?

A. Yes sir.

Q. 91. And which way were the horses standing there?

A. Standing facing the aisle.

Q. 92. And that is the same aisle the others were—crossing this we get to another aisle, and then were two stalls at the Lexington end of the aisle, and these were facing the aisle (marks across each aisle indicates doors)?

A. Yes sir.

Q. 93. There is a door on the south side of each aisle and a door at the north side of each aisle?

A. There is a door on each side of the car.

104 Counsel for defendant files the draft marked "I, No. 2."

Q. 94. You, of course, didn't see the car after it left Lexington, or after you left it down at the yards?

A. No sir.

Q. 95. The next day you saw it at Frankfort?

A. Yes sir.

Q. 96. What was the condition of that car?

A. Well, it was charred where the fire had burned in it.

Q. 97. What evidence of a fire did you discover?

A. I could see where — had been a fire in it.

Q. 98. Was it burned, the sides burned out?

A. No sir, I don't think the side was burned out, it was charred.

Q. 99. What was the condition of the door, did you notice?

A. I don't know that I noted the doors particularly.

Q. 100. You can't say then what the condition was?
A. You mean with reference to, be burned?
Q. 101. Yes.
A. No, I couldn't say.
Q. 102. With reference to being broken open?
A. The door of the front end of the car looked like it had been bent in, I think it had been slivered.
Q. 103. Where was the car when you first saw it?
A. At the cattle pen there.
Q. 104. What horses did you see the next morning when you went there?
A. I saw all of them except two Star Shoot colts.
Q. 105. Had those been destroyed?
A. Yes sir.
Q. 106. Where was the third one of those?
A. In the cattle pen there.
105 Q. 107. When was that one destroyed?
A. Destroyed that afternoon.
Q. 108. On the 18th?
A. Yes sir.
Q. 109. I didn't quite catch—do you recall what was the condition of number 4, of those animals, that in the petition would be a bay filly by Miller, dam Lady Premier, did you see that filly that day?
A. Yes sir.
Q. 110. Where did you see her?
A. At the livery stable.
Q. 111. What was her condition?
A. Burned about the nostrils, eyes and ears and over the back.
Q. 112. Do you recall the condition of the black and brown filly, Ethelbert, dam Miss Wicks?
A. Burned about the head and a spot or two on the side.
Q. 113. Whereabouts about the head?
A. About her foretop, ears and mane.
Q. 114. The black colt by Jack Point, dam Lady Vincent?
A. He was burned about the same way.
Q. 115. The bay colt by Star Shoot, dam Amy Davenport?
A. He was scorched about the head and mane.
Q. 116. You took the bay filly by Miller, black or brown filly by Ethelbert and the black colt by Jack Point and the bay one by Star Shoot, Amy Davenport to Juarez you say?
A. Yes, all four of them.
Q. 117. When did you take those animals to Juarez?
A. Along about the fourth or fifth of December.
Q. 118. What had you done with them between that time and the time you started them off down to Juarez?
A. I brought them back to Lexington and kept them at the track and walked them.
106 Q. 119. I suppose — had a veterinary to see them?
A. Yes sir.
Q. 120. When did you reach Juarez with them?

A. About the 9th or 10th of December, I think it was.

Q. 121. Now what did you do with those animals upon reaching Juarez, with each of them?

A. Well, as soon as they had raced, I put them right in training except the Lady Premier filly; her back was so bad I couldn't do anything with her.

Q. 122. You took her down there and didn't put her in training?

A. No sir.

Q. 123. How long did you train Lady Premier and the others?

A. I am still training them.

Q. 124. Where are they?

A. At Juarez.

Q. 125. To whom did they belong?

A. To Mr. Woodford and myself.

Q. 126. What is the name of this bay filly by Miller, dam Lady Beth?

A. Miss Miller.

Q. 127. Did you run her down there at Juarez?

A. I think not; I didn't start her there at all.

Q. 128. Did you run or start the bay filly by Miller, dam Lady Premier?

A. Which filly did you ask me about?

Q. 128½. I believe I asked you about that,—that you did not start?

A. No, I didn't start the Lady Premier filly.

Q. 129. The black and brown filly by Ethelbert, dam Miss Wicks?

A. I started her two or three times.

Q. 130. How many times did you start her?

107 A. Probably four times, three or four or five, I could not say.

Q. 131. What was her name?

A. Ethel Wicks.

Q. 132. Give me a race,—name the place where the filly Wicks run?

A. I couldn't do that; I could get the Guide, it is a matter of record.

Q. 133. I believe you kept a record, what do they call that?

A. Chicago Racing Form and Turf Guide, printed in Chicago.

Q. 134. When did Miss Wicks first start?

A. At Juarez, last winter, 1911.

Q. 135. You can not give me the name of the race?

A. No, just started in some of the races.

Q. 136. About how many?

A. I said I started her, probably four times.

Q. 137. Did she ever get a place?

A. No sir.

Q. 138. Did you ever start the other one the next one there, that was the filly,—black colt, by Jack Point, dam Lady Vincent?

A. Yes, I started him down there, probably about six times. He was second once and third once.

Q. 139. Did you ever run the bay colt by Star Shoot, out of Amy Davenport?

A. I think I started him three times there at Juarez, probably four.

Q. 140. Did he ever get a place?

A. No sir.

Redirect examination:

Q. 1. Why did you continue to work these horses since the fire?

A. Well, because I had a good deal of money invested in them and I wanted to get something out of them, if there was anything in them.

108 GORDON, FRED L., who having been first duly sworn testified on behalf of the plaintiffs as follows:

Q. 1. Where do you live?

A. Frankfort.

Q. 2. What is your occupation, or profession?

A. Policeman.

Q. 3. How long have you been a policeman?

A. About three years.

Q. 4. Were you on the Frankfort Police Force?

A. Yes sir.

Q. 5. Were you so engaged on November 17th, 1910?

A. Yes.

Q. 6. Did you see an Arms Palace Horse Car on which horses were injured and horses were burned on that night?

A. Yes sir.

Q. 7. When did you first see that car?

A. Up at the depot about 10:45.

Q. 8. Now where is the depot located in Frankfort?

A. On Broadway, between Ann and High.

Q. 9. Just the other side of the tunnel in Frankfort, is it not?

A. Yes sir.

Q. 10. Do you know how long that train laid there?

A. It left at eleven o'clock.

Q. 11. It left the depot in Frankfort at eleven o'clock?

A. Yes sir.

Q. 12. Where did it go?

A. Across the river.

Q. 13. By across the river—explain what you mean—the distance from the depot?

A. It is about an eighth of a mile from the depot west—it
109 is called West Frankfort.

Q. 14. Did you see that car again?

A. Yes sir.

Q. 15. After that train went to West Frankfort, where did you go?

A. I went down Broadway towards the railroad bridge.

Q. 16. As you went down Broadway towards the railroad bridge, did you hear anything over in West Frankfort at the railroad bridge?

A. When I got on the end of the bridge they were switching; they had taken water before I got there, and they were switching.

Q. 17. Did you hear the switching?

A. Yes sir.

Q. 18. Describe to the jury the noise that was made?

Defendant objects, which objection is sustained by the Court.

Q. 19. Did you hear anything over there at that switch?

A. Yes sir.

Q. 20. Describe to the jury just what you heard?

A. I was standing on the north end of the bridge towards the depot, and they were switching on the south end, just below the water tank, and while I was standing there, I suppose I had been there ten or fifteen minutes, I heard a noise like the air had been shut off, and it made a crash.

Q. 21. Crash of what?

A. I was five or six hundred yards from it, and you could hear it; why, it made a terrible noise.

Q. 22. A noise as of what?

A. As if the air had been shut off, like the trains were coming together.

Q. 23. After you heard that crash, what did you next hear?

A. Well, I turned then.

110 Defendant moves to exclude that.
No ruling by the Court.

Q. 24. Was there any other train over there at that time?

A. No sir.

Q. 25. Was that this train that you heard this terrible crash?

Defendant objects.

COUNSEL FOR PLAINTIFFS: Well, leave off the adjectives.

A. Train No. 29.

Q. 26. What did you hear after that—tell what you heard?

A. I left and went up two squares, and then I heard some hollering; I stood there about five minutes and started back towards the bridge, and I met three darkeys, leading some horses; I think the conductor was in front of them with a lantern.

Q. 27. How many horses were they leading?

A. Six.

Q. 28. Did you recognize any of those darkeys?

A. Two of them; I didn't recognize them then; I did afterwards.

Q. 29. Who were they?

A. Two I found worked for Mr. Ireland, so they told me.

Q. 30. Do you remember how many horses each was leading?

A. I think one of them had one, the other two had the others; one was burnt very bad and he was leading him alone.

Q. 31. Did you have anything to do with those darkeys then?

A. Not until they got to the livery stable and I called the darkey up.

Q. 32. Did you know what those darkeys did when they got to the livery stable?
A. Yes sir.
Q. 33. Tell the jury?
111 A. They got the horses in the stable; got the darkey that tended to the livery stable and then I told the yellow boy, "You had better notify the owners of the horses, and I will go for a doctor.

Defendant objects to the conversation, which objection is sustained by the Court.

Q. 34. Do you know what that boy did?
A. Yes, they went over to the Capital Hotel and telephoned.
COUNSEL FOR DEFENDANT: Were you with them?
A. No sir.

Defendant objects.

Q. 35. Did you see them where they went?
A. I seen them go to the hotel.
Q. 36. Did you see either one of those boys after that time?
A. Yes, saw both of them.
Q. 37. Where?
A. In the livery stable.
Q. 38. And about what time was that?
A. About one o'clock.
Q. 39. Did you go anywhere with them after that?
A. I told the black boy to get a lantern and I would go with him and see how the other two horses were, so he got the lantern and we went over to the car; I got up in the car with the boy and found two horses in the north end of the car burnt terribly; they couldn't see, one of them; eyes burnt out.
Q. 40. Which end?
A. I mean towards Louisville, south end of the car.
Q. 41. Did you notice any evidence of fire having been in that car?
A. Yes sir, in the south end.
Q. 42. Tell the jury what you saw?
A. Well, the car was very much blackened with smoke and cinders, and burnt up.
112 Q. 43. Where was it blackened?
A. From the front wall, back.
Q. 44. How about the aisle?
A. Well, the aisle was very narrow where they went into the second part, but between the two partitions, that is where they placed the horses, there was a place, I suppose about twelve feet.
Q. 45. Well, what was the condition of the floor of that car with reference to having been burned?
A. It was burnt.
Q. 46. Where?
A. Up the sides, and on the bottom, and ceiling.

Q. 47. Did you see any lanterns hanging in that car?

A. In the aisle was two wires crossed, and in the center of it was the handle of a lantern; the bottom part was out—the globe of it.

Q. 48. Did you see the bottom part of the lantern there anywhere?

A. No sir.

Q. 49. How long did you remain over there at that time?

A. I suppose ten or fifteen minutes.

Q. 50. Where was the handle you speak of?

A. Right in the center hanging on a wire.

Q. 51. Which of the wires in that car were broken?

A. There wasn't no wire broken, the east end wire, the north end you might call it.

Q. 52. Where were the ends of that wire?

A. Hanging down.

Q. 53. Did you notice that lantern had been suspended from the roof of that car, the ceiling of it?

Defendant objects, which objection is sustained by the
113 Court.

Q. 54. Well, did you notice how it had been suspended in the car?

A. There were two wires run diagonally—one this way, one the other, crossed over, and the lantern was hanging in the center.

Q. 55. What were they hanging to?

A. I think they were nailed to the side of the car; might have been wrapped around a staple—I didn't notice particular.

Q. 56. After you were at that car where did you go?

A. Went back up to the stable.

Q. 57. How long did you remain there?

A. About five o'clock.

Q. 58. How many horses were at the stable?

A. Six.

Q. 59. Tell the jury what their condition was with reference to being burnt?

A. Well, one of them was burnt fatal; I didn't think it would live until morning.

Defendant objects, which objection is sustained by the Court.

Q. 60. Tell how it was burned.

A. His nose was almost burnt up and all the flesh was almost burned off his shoulders, and off his back, and there was another *sig*ned pretty bad over the head and all of them were singed.

Cross-examination.

Q. 1. What time of night was it you first saw the car?

A. 10:45.

Q. 2. Was it moving or standing when you first saw it?

A. I was standing on the corner and it pulled up right in front of me and stopped.

Q. 3. Where were you?

A. On the corner of Ann and Broadway.
Q. 4. You know where the Capital Hotel is there?
A. Yes sir.
114 Q. 5. What street is that that runs down?
A. Ann.
Q. 6. That is the street that crosses the railroad track?
A. Yes sir.
Q. 7. Where were you standing with reference to that?
A. On the depot corner.
Q. 8. And the train pulled up and stopped there?
A. Yes sir, the engine stopped just beyond the north crossing.
Q. 9. How long did it stay there?
A. It stayed there fifteen minutes.
Q. 10. It pulled up from there about what time?
A. Eleven o'clock.
Q. 11. Did you look to see what time?
A. I went to the depot—I came out as the conductor did.
Q. 12. And you looked at a clock in there?
A. Yes sir.
Q. 13. And it was eleven o'clock?
A. Yes sir.
Q. 14. Where did you go then?
A. Went on down Broadway.
Q. 15. Going in what direction?
A. South.
Q. 16. In the direction of Louisville?
A. Louisville, yes sir.
Q. 17. Where were you going?
A. That is my beat, all the way down, plumb to the river.
Q. 18. Your beat is across the river to where?
A. Across the river to West Frankfort.
Q. 19. How do you cross the river?
A. Over the railroad bridge.
Q. 20. Is there a foot bridge there?
A. Yes sir.
115 Q. 21. What did you do on this occasion?
A. I stopped on the Lexington end.
Q. 22. How long had it taken you to go down there?
A. Suppose it took me five minutes.
Q. 23. Did you stop any place?
A. No sir, walked along leisurely, like policemen would do.
Q. 24. You got on that bridge and stopped?
A. Yes sir, they had taken water when I got there.
Q. 25. Could you tell from where you were that they had taken water?
A. I could hear the water running.
Q. 26. Hear the water running across the river?
A. Yes sir.
Q. 27. How far was it from the north end of the bridge where you were standing to the point where the water tank was?
A. About one hundred yards.

Q. 28. One hundred yards across that river to the water tank?
A. Might be a little more; not more than one hundred and twenty five yards nohow.
Q. 29. Describe where the tank is with reference to the south end of the bridge?
A. It stands about one hundred feet from the bridge.
Q. 30. So, according to your statement, it would be about four hundred and twenty-five feet from where you were?
A. Yes sir.
Q. 31. Well, now, when you stood there, what was the next thing you saw?
A. Well, they had pulled up—they pulled up then.
Q. 32. What do you mean by pulling up?
A. Pulled down in the yards.
Q. 33. Pulled further south?
A. Yes sir.
116 Q. 34. How much had they gone?
A. I couldn't tell you—four or five hundred yards.
Q. 35. You were still standing at the north end of the bridge?
A. Yes sir.
Q. 36. What did you hear then?
A. They were switching down there and then I heard this noise like the air broke their brakes, the trains come together; you could hear it plain.
Q. 37. What?
A. The noise.
Q. 38. What about the air?
A. You couldn't hear the air; you know if the air *holes* bust it stops suddenly, throws it all together.
Q. 39. And then there came a noise, or as you say, a crash?
A. Of cars coming together.
Q. 40. What do you call it, a noise or a crash?
A. Well, call it both.
Q. 41. It was both a noise and a crash.
A. (No answer.)
Q. 42. Do you call it a crash and a noise, or a noise and a crash?
A. It was a loud noise.
Q. 43. You didn't hear the air whistle out of the air pipes?
A. I could hear the noise.
Q. 44. If it had been air, where did you suppose that air was transmitted to and escaping from?
A. Escaping out of the pipe, wherever it passed out.
Q. 45. How far was that train standing from you when you heard that noise?
A. I suppose four or five hundred yards.
Q. 46. Then what did you do?
A. I stayed there a few minutes, then turned and walked up Broadway.
117 Q. 47. You stayed there a few minutes and then walked backward in the direction of the depot, that is walked east?
A. Well, north or east, either one.

Q. 48. Well, towards Lexington?
A. Yes sir.
Q. 49. How far did you walk?
A. About two squares and a half.
Q. 50. To what street?
A. Washington and Broadway.
Q. 51. How far is that west of Ann Street where Ann Street crosses?
A. Two squares.
Q. 52. So you stopped when you turned and came up in the direction of the depot, you stopped about two squares west of where you had started from?
A. Yes sir.
Q. 53. From where you had first seen the train?
A. Yes sir.
Q. 54. What did you do when you stopped there?
A. Stood there awhile, and directly I heard some hollering, I started back towards the bridge.
Q. 55. What was the hollering?
A. It was from the river; it was my duty to investigate, to see what it was.
Q. 56. Was there anybody with you?
A. No sir.
Q. 57. Did you see anybody moving about there at that time, until you met these men with the horses?
A. O, I seen plenty of men on the street early in the night.
118 Q. 58. I mean at that time?
A. No sir, it was cold that night, everybody was off the streets.
Q. 59. The air was quite cold?
A. Yes sir.
Q. 60. Did you see anybody at all coming in the direction of where you heard that naise, or going there, except those men you saw subsequently with the horses?
A. No sir.
Q. 61. If there had been anybody else in that locality, you were in a situation to have seen them?
A. Yes, I would probably have paid no attention to it.
Q. 62. You do not recall anybody?
A. No sir.
Q. 63. When you went down, going in the direction of Louisville, to investigate that noise and hollering, how far did you go?
A. As far as what we call Winkerson Street.
Q. 64. How many squares west of Ann Street?
A. Three.
Q. 65. You still walked along Broadway west down to Wilkerson Street?
A. Yes sir.
Q. 66. What did you do when you got there?
A. I saw these people coming and I stopped.
Q. 67. Where were you when you first saw them?

A. In the street coming off the bridge.
Q. 68. Had they left the bridge when you saw them?
A. Yes sir.
Q. 69. Coming how far east?
A. They was coming up the street.
Q. 70. When you first saw them how far had they come from the east end of that bridge?
119 A. I couldn't tell; I wasn't close to them.
Q. 71. Did you still remain standing?
A. No, I walked on up the street towards Ann.
Q. 72. You turned when you saw these people coming and went——
A. Towards Ann Street.
Q. 73. Coming in the direction of Lexington?
A. Yes sir.
Q. 74. How far had you gone in that direction before they overtook you—if they did overtake you?
A. Yes, they overtook me; I wasn't gone very far. I suppose twenty yards.
Q. 75. Were you still moving when they overtook you?
A. Yes sir.
Q. 76. They must have walked faster than you?
A. Yes sir.
Q. 77. Were you walking slow or fast?
A. I was walking slow.
Q. 78. What did you see?
A. I saw three darkeys leading six horses.
Q. 79. And then where did you go?
A. I followed them on up to the livery stable, Manford'*d* and Rogers.
Q. 80. Where was that located?
A. On Main Street.
Q. 81. Was there anybody with those three darkeys?
A. I didn't see them if there were.
Q. 82. I thought you said something about the conductor?
A. He come on up as far as Ann Street, and then went to the depot.
Q. 83. Did he come with the darkeys?
A. He was ahead of them, ten or fifteen feet ahead of them, going in the direction of the horses.
120 Q. 84. Ahead of them going in the direction of the horses?
A. Yes sir, and they darkeys were leading the horses.
Q. 85. And went to this livery stable?
A. Yes sir.
Q. 86. What was the next thing you saw?
A. We got the darkey up that stays there at night.
Q. 87. You roused him up?
A. Yes sir.
Q. 88. What time of night was this?
A. Close to one o'clock.
Q. 89. When did that crash occur down there?

A. It must have been about twelve.

Q. 90. An hour had intervened between the time you talked about the crash and the——

A. I wouldn't say that long.

Q. 91. Well, about how long?

A. Yes, it was about between eleven and twelve.

Q. 92. And then what was the next thing you saw?

A. Well, I went and got a doctor.

Q. 91. Who was the doctor?

A. Dr. Seay.

Q. 94. Did you see the Doctor?

A. Yes, I went up two flights of steps and stayed until he got up; the horses were in a bad condition, I wanted them attended to right away.

Q 95. Did you and he go to the stable together?

A. Yes sir.

Q. 96. What did you see there?

A. Saw the horses.

Q. 97. Describe the appearance you saw?

A. He was burnt all over the mouth, on the shoulders and back, and he had numerous burns on him; I saw it where all of them were.

121 Q. 98. What was the color of that one?

A. Sorrel.

Q. 99. Was it a colt or filly?

A. I think a colt.

Q. 100. That was burned on the mouth?

A. Yes sir.

Q. 101. And on the shoulders?

A. Yes sir.

Q. 102. And somewhere on the back?

A. Yes sir.

Q. 103. Was there any other you saw?

A. Another one burnt on the head and scorched on the shoulder.

Q. 104. Where abouts on the head?

A. On the foretop.

Q. 105. Was it burned on the skin?

A. Yes sir.

Q. 106. Was there another one?

A. Yes burnt one.

Q. 107. Was that a colt or filly?

A. Colt, I think.

Q. 108. Was there any other hurt?

A. I don't think any other hurt seriously.

Q. 109. About how was that hurt seriously, and the other you have indicated?

A. I am no doctor, you know.

Q. 110. After that what became of you?

A. I took the dark skin boy and told him to get a lantern——

Q. 111. You went with him to get a lantern?

A. He got a lantern and I went with him and we went into the car.

Q. 112. How did you get into the car?

122 A. In a side door, on the right as you go towards Louisville.

Q. 113. There are two doors on the side of that car, which one did you enter, the one furthest away from here towards Louisville, or the one towards Lexington?

A. They are just opposite to each other, about the same distance.

Q. 114. You did not see two doors in the side of that car?

A. Yes, these doors I am talking about.

Q. 115. Did you see two doors on one side?

A. One door on one side.

Q. 116. You did not see but one door on the side of the car?

A. That was all that was in the center of the car.

Q. 117. What did you do then?

A. I examined the car and the other two horses; I was going to see if I could get them out.

Q. 118. Which end were the two horses standing in?

A. North end.

Q. 119. Did you get them out?

A. No sir.

Q. 120. They left them there, did they?

A. Yes sir.

Q. 121. What was their condition?

A. One of them you might say all of his skin was burnt off.

Q. 122. All the skin?

A. All the hair,—his eyes were burnt out.

Q. 123. You could not tell what the color of that fellow was if he had no hair left?

A. Looked like he might have been a sorrel.

Q. 124. If all the hair was burned you could not tell.

A. Well, there was some hair left.

Q. 125. Which stall was he standing in?

A. He wasn't in a stall; he was out of the stall in the back part of the car.

123 Q. 126. In one of the aisles?

A. No, in the back part; there was a space in there that he could stand in.

Q. 127. Space between the stalls and the side?

A. Space between the back stalls and the front stalls.

Q. 128. How many stalls were in there?

A. I think eight.

Q. 129. Which one of those spaces was occupied by this——

A. Back one towards Louisville.

Q. 130. South end of the car?

A. South end.

Q. 131. What else did you see there?

A. I saw another horse standing in the stall facing the east.

Q. 132. Which end of the car?

A. In the middle.

Q. 133. Did you see anything else?
A. Never saw any other horse.
Q. 134. Anything else?
A. Saw some hay there.
Q. 135. Baled hay?
A. Baled hay.
Q. 136. Was there any loose hay there?
A. I didn't see any there—might have been.
Q. 137. You didn't see any loose hay there that had been fed the horses with?
A. I didn't notice any.
Q. 138. What kind of bedding was there?
A. I couldn't tell you it might have been hay.
Q. 139. Might have been straw, might have been hay, or might have been something else, and you didn't see anything else there?
124 A. No sir.
Q. 140. Did you see anything else?
A. I saw where this lantern was.
Q. 141. Where was that?
A. Yes.
Q. 142. Was it hanging?
A. Yes.
Q. 143. To what?
A. On a wire.
Q. 144. Didn't you say there was a light on the side of the car?
A. No, a lantern hanging in the center—lantern hanging.
Q. 145. What kind of lantern was it?
A. I couldn't tell you; there was nothing but the handle.
Q. 146. Did you look to see it?
A. Yes sir.
Q. 147. Did you look for it?
A. No sir.
Q. 147. Did you go underneath it?
A. Walked underneath the handle.
Q. 148. And you did not see any part of it at all?
A. No sir.
Q. 149. Simply the handle of the lantern hanging there?
A. Yes sir.
Q. 150. You didn't see any lantern there, simply the handle of the lantern hanging there?
A. Yes sir.
Q. 151. Describe to the jury the way those wires were fixed?
A. The ends were attached to each side of the car.
Q. 152. Diagonally across?
A. Yes sir.
125 Q. 153. Do you know how those ends were fastened to the car?
A. I didn't notice particular.
Q. 154. Did you notice any of them?
A. I noticed they were fastened.

Q. 155. But you did not notice how?
A. No sir.
Q. 156. I understood you to say one end was hanging?
A. Yes sir.
Q. 157. Then that was not fastened?
A. No sir.
Q. 158. Which wire was that—from the east towards the west, or the north towards the south?
A. Well, it was the northeast, the way that tracks runs.
Q. 159. Which wire are you describing, the one that was fastened up or the one hanging down?
A. Hanging down.
Q. 160. Which end was hanging down?
A. The one that it pulled loose from the side.
Q. 161. Did you observe to see what had attached that wire to the side of the car, and what had held it in position?
A. No sir.
Q. 162. Did you look to see what fastened the ends of them?
A. No sir, they might have been hooked to nails, or wrapped round steeples.
Q. 163. Did you notice to see whether they had been broken or just come loose?
A. No sir, I didn't look at that.
Q. 164. You did not?
A. No sir.

126 FRAKES, CHESTER, (Col.) who having been first duly sworn testified on behalf of the plaintiffs.
Q. 1. Where do you live?
A. Paris, Ky.
Q. 2. Do you mean that is where you were raised?
A. Yes sir.
Q. 3. Where were you during the month of November, 1910?
A. I was at Latonia and here.
Q. 4. On the 17th day of November, 1910, where were you?
A. I *were* here.
Q. 5. In Lexington?
A. Yes sir; got here at twelve o'clock in the day.
Q. 6. You were employed on the 17th day of November, 1910 how?
A. With a string of horses.
Q. 7. Who were your employers?
A. Mr. Ireland and Mr. Woodford.
Q. 8. What Woodford?
A. Mr. Catesby Woodford and Mr. John T. Ireland.
Q. 9. Had you anything to do with their horses that day?
A. Yes sir.
Q. 10. What?
A. I was in charge of eight horses shipped over from here to Mexico.
Q. 11. How were they to be shipped?
A. Shipped up here and from here to Louisville.

Q. 12. Did they start from here?
A. Yes sir.
Q. 13. Where were they loaded?
A. At the track.
Q. 14. On what sort of a car were they loaded?
A. Arms Palace Car.
Q. 15. What was done in preparing that car for the horses?
127 A. Nothing but the stalls built for them.
Q. 16. What was put in the car?
A. Saw dust.
Q. 17. Where was the saw dust put?
A. Underneath the horses.
Q. 18. Who did that work?
A. I don't know; it was done with the car back out at the shoot, I guess the railroad people done it.
Q. 19. Were you present when the horses were loaded?
A. Yes sir.
Q. 20. Who else was there present?
A. Horace Moore, Bob Gaines and Mr. Lewis.
Q. 21. Did you see Mr. Ireland there any time?
A. Mr. Ireland, yes sir.
Q. 22. What was put in the car?
A. Eight horses loaded and two traps.
Q. 23. Any feed of any kind?
A. Nothing but hay.
Q. 24. Were there not oats put in?

Defendant objects which objection is sustained by the Court.

Q. 25. Have you told all that you recall that was there?
A. Yes sir.
Q. 26. To refresh your recollection wasn't there some oats put in?

Defendant objects which objection is overruled by the Court, to which ruling of the Court defendants excepts.

A. Yes I think a couple of sacks of oats in there.
Q. 27. How many stalls were in the car?
A. It was eight.
Q. 28. Where were those stalls, if you can describe to the jury?
A. Well, it was two in each end and four in the middle.
128 Q. 29. How many aisles were in the car?
A. Two.
Q. 30. How many doors on each side of the car?
A. Two doors on each side.
Q. 31. With reference to those doors on each side of the car, where were those aisles?
A. Right in front of the doors.
Q. 32. Was there anything other than the eight stalls in that car pertaining to the car at that time?
A. No sir.
Q. 33. Was there anything dividing the stalls?
A. A partition between the middle stalls.

Q. 34. A partition you say between the middle stalls?
A. Yes sir.
Q. 35. And did that partition run lengthways of the car or crossways?
A. Crossways.
Q. 36. What was in the partition, if anything?
A. Well, it was a door.
Q. 37. Well, do you recall where that door was in that partition?
A. Yes, on the right hand side of the car.
Q. 38. As you go towards that way? (Indicating with his hand.)
A. Louisville.
Q. 39. Suppose this drawing represents the floor plan of the Arms Palace Horse Car, on which these horses were loaded (showing him the draft)?
A. Yes sir.
Q. 40. This end, where "Louisville end" is written in words, these two squares are two stalls in the Louisville end of the car—this long narrow space across the car representing an aisle between the
129 two doors on opposite sides of the car; those two squares two stalls, this heavy blank line the partition?
A. Yes sir.
Q. 41. This open space in the partition is the door?
A. Yes sir.
Q. 42. These two squares are stalls on the Lexington side of that partition in the car?
A. Yes sir.
Q. 43. This long narrow space across the car an aisle between the two doors, one on each side of the car?
A. Yes sir.
Q. 44. And these two squares two stalls in the Lexington end of the car?
A. Yes sir.
Q. 45. *How* where were the lanterns hanging in that car?
A. In the aisle way, right there; one there and one there (pointing on the paper).
Q. 46. How were those lanterns secured?
A. They were wired four ways.
Q. 47. What do you mean by wired four ways?
A. Wired straight across; wired this way and across this way.
Q. 48. The wires crossing the car,—how were the ends next to the side of that wire fastened?
A. Underneath it over the doors, with ten penny nails and then wire fastened around it and clinched.
Q. 49. Is that true of both ends of the wire?
A. Yes sir.
Q. 50. And what were the ends of the wire across in the aisle in that car fastened to?
A. To the partition up over the stalls, up in the top of the car.
130 Q. 51. How were those wires fastened?
A. The same as the others was.

Q. 52. Where was the lantern hanging with reference to where these wires crossed in the center of the car?

A. They were hanging right in the center of the top and nailed.

Q. 53. Describe to the jury how that nail was placed?

A. It was driven in so far and then clinched there.

Q. 54. Where was the lantern with reference to that?

A. It was hanging on the nail and clinched in this, driven in and clinched.

Q. 55. And the lantern suspended from that?

A. Yes sir.

Q. 56. And these wires what had they to do with that lantern, after it was hanging there and clinched?

A. It was to keep the lantern from swinging back and forth.

Q. 57. How was this lantern in the Lexington end of the car?

A. It was fixed the same.

Q. 58. Who fixed this lantern?

A. I fixed this one and Mr. Bob Gaines fixed the one in his Lexington end.

Q. 59. Who is Bob Gaines?

A. He was the one who had charge of Mr. Woodford and Mr. Ireland's yearlings when we come after them.

Q. 60. When these horses were loaded what horse was put in the stall in the right hand end stall, as you go towards Louisville?

A. Star Shoot colt out of Blue Danube.

Q. 61. What in the other stall in that end of the car?

A. Star Shoot colt out of Last Cherry.

Q. 62. Crossing that aisle and on the 1st hand side, as you go to Louisville, what horse was on that side?

131 A. The Miller bay filly.

Q. 63. In the other stall on the Louisville side of the partition in that car, the stall on the right hand side of the car where that door in that partition, what horse was there?

A. Another Miller filly, I have forgotten the dam.

Q. 64. What horse was in the stall next to that partition in the Lexington end of the car?

A. Marsand.

Q. 65. What horse was in the stall next to the partition on the left hand side of the car as you go towards Louisville, if you remember?

A. I don't remember now.

Q. 66. Well, what horse was in the stall on the right hand side in the Lexington end of the car?

A. The Star Shoot colt?

Q. 67. Well had these horses been named at the time they were loaded in that car?

A. I didn't know their names, if they had.

Q. 68. What horse, if you remember, was in the left hand end stall towards Lexington?

A. The Jack Point colt.

Q. 69. Who loaded those horses into that car?

A. Me and Mr. Gaines.

Q. 70. Who was present at the time?
A. Mr. Lewis, Horace Moore and Mr. Ireland.
Q. 71. Do you know whether or not Mr. Ireland was there all the time during the loading of the horses?
A. No sir; I think he started directly after we started loading.
Q. 72. What time was it when the loading had been completed and the lanterns hung?
132 A. About 6:30.
Q. 73. And how long then had you been there engaged in this loading of this car?
A. We started loading about four or a little after.
Q. 74. What then was put in the car?
A. Some screens and a box, some hay and some oats.
Q. 75. Where was the hay and oats put?
A. It was divided in each aisle, so we could feed out of each aisle.
Q. 76. Where did you take your position in that car?
A. Front end towards Louisville.
Q. 77. In the stall or in the aisle?
A. In the aisle.
Q. 78. Who else was in that car?
A. Horace Moore.
Q. 79. Where did he take his position?
A. In the aisle, the hind end.
Q. 80. Where was that car taken to?
A. It pulled out from the shoot away in the yard.
Q. 81. To what point?
A. Pulled out away down in the yard, way below the L. & N. Freight Dep-t.
Q. 82. Well, did you see any one after that car was pulled into town, or the yards?
A. In the yards nobody but a man that brought me a bill.
Q. 83. What man?
A. I don't know who it was, some freight man; I went to the freight office after the bill and he was on his way there with it.
Q. 84. Did you see that man any more?
A. I was in the car when he got there with the bill.
Q. 85. Where were you when he got there with the bill?
133 A. Standing in the door.
Q. 86. Which door were you standing in?
A. In my door.
Q. 87. On which side?
A. On this side of the car; on the right hand side of the car going towards Louisville.
Q. 88. Then you were standing in this door?
A. Yes.
Q. 89. Door open?
A. Yes sir.
Q. 90. What was it you say that man brought you?
A. A bill of the car.
Q. 91. Would you know that if you were to see it again?
A. Yes sir.

Q. 92. I will ask you if this is the paper that man presented to you?

A. Yes sir, 5011, that is my bill.

Q. 93. Where was the man who presented you with this bill at the time he gave it to you?

A. He was standing at the door on the ground.

Q. 94. What was the condition of your lantern at that time?

A. Not a thing.

Q. 95. Was it lighted or not lighted?

A. Yes sir, it was lit.

Q. 96. Was that man standing where he could see into that car?

A. Yes sir.

Q. 97. What did you do with this paper?

A. Put it in my pocket after I looked at it.

Q. 98. What time was it when that man handed you that paper?

A. Right about nine o'clock.

Q. 99. Where was Horace at that time?

A. In the front door.

134 Q. 100. How long after that before your train moved?

A. About ten or fifteen minutes.

Q. 101. And that was about what time?

A. About twenty minutes after nine when she left there.

Q. 102. What disposition was made of the open door at that time?

A. One door opened on each side of the right hand side going towards Louisville, both doors were open; none on the other side at all.

Q. 103. Were those doors closed at any time after that?

A. As soon as we pulled out we closed the doors.

Q. 104. Where was this car with reference to the engine?

A. Right next to the engine.

Q. 105. You went from there to where?

A. To Frankfort, we were on the way to——

Q. 106. How long have you been working with race horses?

A. Going on fifteen years.

Q. 107. Have you traveled much or little in horse cars with horses?

A. All my life; ever since I have been with them.

Q. 108. Do you know what the usual and proper manner is for handling horses and hanging lanterns in cars?

A. Well, I never seen any lanterns hung any other way but with wires four or five.

Q. 109. And were the lanterns as hung and the stall as you state in this car, the usual and proper way?

Defendant objects which objection is sustained by the Court.

Q. 110. Well, with reference to the way you have always seen put in these horse cars, and lanterns hung, how were these lanterns hung?

A. The lanterns were hung like I always seen them; and the cars were stalled just like they always stall cars for eight horses.

135 Q. 111. What was the position of those doors after you left Lexington; the doors in this partition?

A. It was closed.
Q. 112. After you left Lexington, what did you do?
A. After the car got to running I laid down on some hay.
Q. 113. Where?
A. In the aisle way.
Q. 114. About what part of the aisle way?
A. Facing that way I laid my head.
Q. 115. Where was the lantern with reference to where you laid?
A. Hanging up in the middle of the aisle way.
Q. 116. How far above your head when you were standing?
A. I just come right up, standing.
Q. 117. Stand up and show to the jury?
A. (Which witness does.)
Q. 118. How long did you lie on the floor?
A. Clean up until the bumping of the car.
Q. 119. What was your position at the time of the bumping of the car?
A. I was laying just like this with my head towards the door on the left hand side until the car bumped.
Q. 120. Were you asleep or awake?
A. I was asleep.
Q. 121. What effect did that bump have on you?
A. Rolled me over a couple*d* of times and woke me up.
Q. 122. What effect did it have on the lantern?
A. Knocked the lanterns in the right handside going towards Louisville.
136 Q. 123. The stall on the right hand side?
A. Yes sir.
Q. 124. And then what happened?
A. The car was in a light blaze.
Q. 125. When you discovered the car in a light blaze, what did you do?
A. I tried to put it out.
Q. 126. Did you succeed?
A. No sir, it got too hot for me.
Q. 127. What did you do?
A. I then turned to the door and hollered for Horace.
Q. 128. To what door?
A. The door behind the Miller filly, the door in the partition.
Q. 129. What did Horace do?
A. I hollered to Horace to open the door, I was on fire. He said wait until I light my lantern. I said, "I am on fire," then he seen the light and opened the door and then we comes into the other aisle way, and then opens the door on the right hand side of the car and jimped out.
Q. 130. On the right hand side?
A. Yes sir.
Q. 131. Nearest the Lexington end of the car?
A. Yes sir.
Q. 132. Was the train standing still or moving at that time?
A. Moving at that time.

Q. 133. What was done then?

A. We jumped out and hollered and they stopped.

Q. 134. When they stopped what was done?

A. They run back and asked how did it happen, and I told them the bumping of the car.

Q. 135. Who were you talking to?

A. Talking to the brakeman and engineer.

137 Q. 136. What did they say?

A. The- said, "No such damn thing."

Q. 137. Then what did you do?

A. Then he asked for the names of the horses, wouldn't give them the names of the horses, jumped back into the car and commenced taking the horses out. I give them the names of the horses, and he said, "What are you going to do," I said, "Get out these horses." He said, "Get out none of these horses;" Horace said "What are you going to do, let them all burn up;" and then they commenced to help put out the fire.

Q. 138. What did you do?

A. Commenced jumping the horses off; I was pulling them and he was pushing them out; he was on the inside of the car.

Q. 139. Do you remember what horses you got out of that car?

A. Yes sir.

Q. 140. Which horses did you get out?

A. We got out the first Star Shoot colt, the two *start* Shoot colts, one Miller filly Marsand, and the Jack Point colt.

Q. 141. Were any other horses left in that car?

A. Two.

Q. 142. Where were they?

A. Right facing each other.

Q. 143. By right facing each other, do you mean they were the two horses in the stalls on the left hand side on the Louisville side of the partition?

A. Yes sir.

Q. 144. When you got those horses out, then what did you do?

A. We took them on to the stable.

Q. 145. Who took them?

A. Me and Horace, and I think one of the brakesmen, if I ain't mistaken someone else helped us; I don't know exactly who

138 it was.

Q. 146. Did any one else as you recall go along with you and Horace as you brought those horses across?

A. No sir.

Q. 147. Have you told all the parties now that you recall as having gone along with the horses and along with you?

A. Yes sir.

Q. 148. Do you recall whether or not the conductor came along ahead of you with a lantern?

A. He did start,—some fellow came along in front with a lantern, I don't know whether the conductor or who he was.

Q. 149. As you came along did you see any one?

A. No sir.

Q. 150. Did you meet anybody after you got, over in Frankfort?

A. The police went back to the fire.

Q. 151. Where did you run across the policeman first?

A. Well I don't remember where we did run across him first.

Q. 152. Where did you take those horses to?

A. Livery stable across from the Capital Hotel.

Q. 153. Do you mean on Main Street and across from the front of the Capital Hotel?

A. Yes sir.

Q. 154. Who did you see at the livery stable when you got there with the horses?

A. Some colored fellow there.

Q. 155. Do you recall how long you remained at that livery stable?

A. I remained there all night.

Q. 156. Did you go away from there at all that night?

A. Yes, I went to the Capital Hotel.

Q. 157. Who went with you to the Capital Hotel, do you remember?

139 A. No sir, I do not.

Q. 158. What did you do when you got there?

A. Phoned to Mr. Woodford to notify Mr. Ireland.

Q. 159. Do you remember who you saw in the Capital Hotel office?

A. I saw the night clerk and a paper reporter came in directly after.

Q. 160. Who did you phone to?

A. Mr. Catesby Woodford.

Q. 161. Do you remember about what time of night it was you did that phoning?

A. Between twelve and one.

Q. 162. Where was Mr. Woodford?

A. He was at home.

Q. 163. Do you know whether or not you talked to Mr. Catesby Woodford?

A. I know I did.

Q. 164. How do you know it?

A. Because I know his voice.

Q. 165. Did you phone to any one else?

A. I phoned to Dr. Shannon directly after I phoned to Mr. Woodford.

Q. 166. Do you know you talked to Dr. Shannon?

A. Yes sir.

Q. 167. How do you know it?

A. Because I called up Bryan and Bryan wasn't there, and they said Shannon was there, and I told him to come to Frankfort.

Q. 168. How did you know it was Shannon you were talking to?

A. I wouldn't swear to it that it was Shannon I was talking to, but his office man said Shannon is here.

Q. 169. Did you see Dr. Shannon there afterwards?

A. Yes.

140 Q. 170. Where?

A. At Frankfort.

Q. 171. At what point was Dr. Shannon when you were phoning?

A. I couldn't say where he was at.

Q. 172. What town were you doing your talking to?

A. To Lexington.

Q. 173. How long after you did that phoning was it before Dr. Shannon got there?

A. About two hours.

Q. 174. After you did this phoning, where did you go?

A. I went back to the stable.

Q. 175. Did you see any one there after going back to the stable?

A. Dr. Seay was there.

Q. 176. Who is Dr. Seay?

A. That is a Doctor there in Frankfort.

Q. 177. What sort of Doctor?

A. Crippled doctor, walks kinder lame.

Q. 178. I know, but is he a veterinary surgeon?

A. Yes sir.

Q. 179. Who else did you see there?

A. Some fellow works for the stable.

Q. 180. Would you know his name if you heard it?

A. I don't know as I would know his name, but I know him.

Q. 181. How long were you with him?

A. He stayed there most all night with us.

Q. 182. Do you recall any one else who was there?

A. No one but the police, those two police.

Q. 183. Do you recall anything about who were the—only one policeman having been mentioned here, do you know the name of those policemen?

141 A. No sir.

Q. 184. Have you see them here?

A. Yes sir.

Q. 185. Was Mr. Fred Gordon one of them?

A. Yes, he was one of them.

Q. 186. The gentlemen who testified here this afternoon?

A. Yes sir.

Q. 187. What was the name of the other one?

A. I don't remember.

Q. 188. Describe him to the jury?

A. He was a light mustache fellow, a tall fellow, light-haired.

Q. 189. What do you mean by light, is there a gentlemen on the jury with hair like his?

A. Very light.

Q. 190. Do you mean gray?

A. Yes sir.

Q. 191. How did he wear his beard, do you remember?

A. No sir.

Q. 192. How many horses did you take to the livery stable?

A. Took six.

Q. 193. Do you remember the ones you took there?
A. Yes, took them all but two Star Shoot colts and the Miller filly.
Q. 194. What became of the six you took to the livery stable?
A. Killed one of them.
Q. 195. Which one?
A. Star Shoot Colt, Blue Danube.
Q. 196. Why was that one killed?
A. Because he couldn't live; he was burned all to pieces.
Q. 197. Can you tell the jury how that one was burned?
A. Yes, *h*e was burned so the skin was just pulling off of him, dropping down.

142 Q. 198. What was the effect of this fire on the other horses you took to the livery stable?

A. They were all singed and burned, one of them burned in the back, hair was all singed.

Q. 199. Do you remember what became of the two that were left in those two left hand stalls on the far side, the Louisville side, of the partition of that car?

A. They were killed the next morning.
Q. 200. Did you see them killed?
A. Yes sir.
Q. 201. Did you see the one that was killed at the stable?
A. Yes sir.

Q. 202. How long did you remain there at Frankfort with those horses?

A. Until the next evening.
Q. 203. And then where did you go?
A. Came back to Lexington.

Q. 204. Had you seen those horses before they were loaded, out here at the track?

A. Yes sir.
Q. 205. Where?
A. At the stable.
Q. 206. How long had you been there with them?
A. I was there most all of that evening.

Q. 207. Had you been out at this track with those horses before that day?

A. With two of them; we had two of them three or four months; I worked with two of them three or four months, the two Star Shoot colts the last Cherry colt, and the Blue Danube colt, the*y* two that were killed.

143 Q. 208. Where had you worked with them?
A. At Saratoga and here.
Q. 209. At the time they were bought at that sale?
A. Yes sir.
Q. 210. How long had you worked with them here?
A. Two months.
Q. 211. Then w-ere did you go?
A. I went to Louisville.

Q. 212. And where were those horses that were loaded here during the time you were at Louisville?

A. Here.
Q. 213. Where did you go from Louisville?
A. To Latonia.
Q. 214. How long did you stay at Latonia?
A. About a month.
Q. 215. And then where did you go?
A. Came here, for to ship these horses.
Q. 216. How long had you been in Lexington before these horses were shipped, after coming from Latonia?
A. About six or seven hours.
Q. 217. And before that you worked out here at the track, what was the disposition of those colts at the time they were loaded on this car?
A. Never saw better dispositions than they had.
Q. 218. You say you don't know about the others?
A. No sir.
Q. 219. Have you seen those horses since the time of this fire down there?
A. These horses?
Q. 220. Yes, and those two?
A. No sir, those two were killed.
144 Q. 221. What about the horses that you got out of that fire that were not killed?
A. Well, I seen them.
Q. 222. What was the disposition, or did you know anything about them before they were loaded on this car?
A. No sir, no more than seeing them loaded.
Q. 223. Have you seen them since?
A. Yes sir.
Q. 224. How long were you acquainted with them after this fire?
A. About six or seven months, along there.
Q. 225. What was their disposition after the fire?
A. They all were foolish about the head, hard to catch, couldn't bridle.
Q. 226. And they continued within your knowledge for how long a time that way?
A. They are still that way.
Q. 227. When did you see them last?
A. At Latonia.
Q. 228. Do you recall when that was?
A. In November, last month.
Q. 229. Do you know where they are now?
A. Some of them are in Mexico.
Q. 230. Did you go to Mexico with them on this last trip?
A. No sir.
Q. 231. And you have not seen them since then?
A. No sir.
Q. 232. At the time of this fire, while the horses were being taken out of that car, describe how the horses acted and what they did?
A. Why, the horses jumped and nickered and hollered like something wild.

145 Q. 233. What was the effect of that fire on you?
A. It burned my ears and nose and I inhaled the flames.
Q. 234. Did it ever have any effect on your hearing?
A. Yes sir.
Q. 235. When you got this door open and came out, you and the horses, how many horses were back in this end of the car at that time?
A. They were all in there when we jumped out.
Q. 236. What do you mean by all?
A. All in this end; we got out before we took out our horses and stopped the train and then jumped back and got out the horses.
Q. 37. Do you know how the horses in the front end of the car came back in there?
A. Came through the door in the partition.
Q. 238. And they were all taken out——
A. Of one door, the right hand door towards Lexington.
Q. 239. As the train goes towards Louisville?
A. Yes sir.

Cross-examination:

Q. 1. There is no aisle lengthways of that car?
A. No sir, nothing but the door there.
Q. 2. Where were you born?
A. Paris, Ky.
Q. 3. How old are you?
A. Thirty-three.
Q. 4. When did you strike Lexington?
A. For the first time?
Q. 5. Yes.
A. 1904.
Q. 6. Into whose employment did you go when you first came here?
A. I was with French Brooks, the trainer for Mr. Clay.
146 Q. 7. What did you do out there, labor?
A. Yes sir.
Q. 8. How long have you been with Messrs. Woodford and Ireland?
A. I worked for them three years and four months.
Q. 9. In whose employment are you now?
A. Baker's.
Q. 10. When did you leave the employment of Mr. Ireland?
A. In September.
Q. 11. Haven't you been in Mexico with Mr. Ireland?
A. No sir.
Q. 12. Did you not go down there with those horses?
A. Not this year; last year I did.
Q. 13. Didn't you stay there with him during that season?
A. Yes sir.
Q. 14. When did you leave his employment?
A. September of this year.

Q. 15. Whereabouts were you?
A. Here.
Q. 16. What had you been doing before that time for him?
A. I was his foreman.
Q. 17. Foreman of what?
A. Of his stable and horses.
Q. 18. That he had out there?
A. Yes sir.
Q. 19. Were you in Mexico with these horses at all?
A. Last winter.
Q. 20. Did you see them run there any?
A. Yes sir.
Q. 21. How many races did she go into, Miss Ethel Wicks?
A. Three or four.
Q. 22. Any more?
A. No sir, I don't think she did.
147 Q. 23. Did his sire run down there?
A. He run about four times.
Q. 24. You trained them right straight along down there?
A. Yes, went along with them as well as we could.
Q. 25. Trained each one of those four you too, down there?
A. Miss Miller, I couldn't do nothing with her.
Q. 26. Never did anything with her at all?
A. It was some time before her back got well.
Q. 27. Didn't you train her down there?
A. Jogged and galloped her a little, yes sir.
Q. 28. When did she get well enough to be——
A. Along in the spring.
Q. 29. When did the season end down there?
A. April.
Q 30. What was the other one you had down there, do you recall?
A. Marsand.
Q. 31. Which one was she?
A. She was the oldest one.
Q. 32. What was her sire?
A. Martisand.
Q. 33. Did Martisand belong to these gentlemen?
A. No sir.
Q. 34. Who were the others you took down there, give the pedigree of the other two?
A. I don't remember what the others was now.
Q. 35. How many colts did you take down there out of that fire?
A. Four.
Q. 36. Name or give me their pedigree?
A. I took First Sire, Jack Wainwright, Ethel Wicks and Miss Miller.
Q. 37. What did you do with Jack Wainwright?
148 A. Run him there.
Q. 38. How often did you run him?
A. Four or five times.
Q. 39. How often did you run First Sire?

A. Four or five times.
Q. 40. How often did you run Ethel Wicks?
A. About four times.
Q. 41. How often the other one?
A. Didn't run the other one.
Q. 42. Miss Miller you didn't run, but you did Jack Point?
A. About five times.
Q. 43. When did you get back from Mexico?
A. April.
Q. 44. Have you been in the employment of Mr. Ireland since?
A. Until September.
Q. 45. You left his employment then?
A. Yes sir.
Q. 26. What day was it that this car was put on the train here?
A. The 17th day of November.
Q. 47. How did you come to remember that?
A. Because I know the day we left.
Q. 48. How long ago has it been?
A. It has been a year.
Q. 49. When?
A. It was a year the 17th day of November past.
Q. 50. Anything special to make you recall the day.
A. A fire is enough to make anybody.
Q. 51. Let's go back to the 17th day of November,—where had you been on the morning of the 17th?
A. I didn't get here until noon.
Q. 52. Where had you been that morning I asked you?
149 A. Been on the way, coming from Covington here.
Q. 53. Then you got here in the forenoon of the 17th?
A. I got here about twelve o'clock.
Q. 54. Where did you go?
A. To the east end.
Q. 55. Whereabouts?
A. To dinner.
Q. 56. Whereabouts did you go?
A. To Miss Annie Hightower's.
Q. 57. After getting your dinner, didn't you go to Ida Wilson's before going to Hightower's?
A. No sir.
Q. 58. When did you go to Ida Wilson's?
A. About three o'clock.
Q. 59. I will ask you if it is not a fact that you went to Ida Wilson's before dinner, and if you did not take several drinks there before dinner, and when you got your dinner you didn't go back there?
A. No sir.
Q. 60. Did you take any drinks there before you came back in the afternoon?
A. No sir.
Q. 61. No drinks?
A. No sir.
Q. 62. Not a single drink?

A. No sir.
Q. 63. Did you get any whisky out at Abe Alexander's out there?
A. No sir.
Q. 64. Did any girls go down to the car there with you?
A. No. sir.
150 Q. 65. Not a single girl?
A. No sir.
Q. 66. Did you and "Go Devil" they call him that don't they?
A. They call him Go Devil.
Q. 67. Did you get any whisky at McNamara's?
A. I was there but didn't get any whisky there.
Q. 68. Did he get any whisky?
A. No sir.
Q. 69. What time of the night did you go to McNamara's?
A. Directly after we pulled down in the yards.
Q. 70. What time was that?
A. Well, about a little after eight.
Q. 71. Who was with you out on the corner there at McNamara's?
A. I disremember who was there.
Q. 72. Was not Go Devil there?
A. No sir.
Q. 73. Go Devil was not there at all?
A. No sir.
Q. 74. Was Ida Wilson there?
A. She might have been.
Q. 75. Was Mamie Kelly there?
A. I disremember.
Q. 76. Don't remember at all?
A. No sir.
Q. 77. Where did you go when you left McNamara's?
A. Went to the car.
Q. 78. Did you go inside of the bar there?
A. I was in there, yes sir.
Q. 79. Didn't take a drink?
A. Didn't take a drink or pay anything.
Q. 80. Didn't any one else give you a drink?
A. No sir.
151 Q. 81. Did you go to the car?
A. Yes sir.
Q. 82. Who went with you?
A. By myself.
Q. 83. Where was Go Devil?
A. He was at the car.
Q. 84. He was there before you?
A. He was already there.
Q. 85. If he was already there, he had to get there before you?
A. He stayed there.
Q. 86. Did he go and get in the car from the race track?
A. Yes sir.
Q. 87. After you and he got together down there, didn't you all go back to McNamara's and get a drink?

A. No sir.
Q. 88. Didn't you get anything at all at McNamara's?
A. No sir.
Q. 89. Any tobacco?
A. No sir.
Q. 90. Any matches?
A. No sir.
Q. 91. Any cigarettes?
A. No sir.
Q. 92. Did not you and Mamie Kelly go back to the car?
A. No sir.
Q. 93. Is it not a fact that Mamie Kelly went from Ida Wilson's place over here at Chicago Bottom, and she went with you from McNamara's to the car?
A. I don't know anybody in Chicago Bottom.
Q. 94. Whereabouts does she live?
152 A. On Deweese Street.
Q. 95. Ida does live on Deweese Street?
A. She did then.
Q. 96. Do you know where she lives now?
A. Chicago Bottom.
Q. 97. You know where Chicago Bottom is then?
A. O, yes sir.
Q. 98. When did she move to Chicago Bottom?
A. I couldn't tell you.
Q. 99. Didn't Ida Wilson, Mamie Kelly and a woman by the name of —— —— all go down and Go Devil too?
A. No sir.
Q. 100. And didn't you and Go Devil both take half a pint of whisky out of the saloon in that part of the country on Deweese Street?
A. No sir.
Q. 101. Hadn't had a drop of whisky the whole day?
A. Yes sir, I took one drink at Mahoney's.
Q. 102. Of what?
A. Brandy, about half past twelve o'clock, or one.
Q. 103. Have enough to make you drunk?
A. No sir, just one brandy.
Q. —. How much?
A. About that much, (showing with his fingers).
Q. 105. Push it a little?
A. The glass you know ain't taller than that.
Q. 106. You didn't have a little glass as that did you?
A. Yes sir.
Q. 107. You got on the car didn't you?
A. Yes sir.
Q. 108. Didn't Mamie Kelly sit on the side of the railroad and you and Go Devil try to get her into that car?
153 A. No sir.
Q. 109. That is not true?
A. No sir.

Q. 110. Didn't you and Go Devil whoop and holler before you went into that car?
A. No sir.
Q. 111. Neither one of you holler?
A. No sir.
Q. 112. Didn't you ask a man to show you where the car was?
A. No sir.
Q. 114. Not a single man?
A. No sir.
Q. 115. What time did you start to that car?
A. A little after eight.
Q. 116. Where from?
A. After I went to McNamara's I went back to the car.
Q. 117. You had been in the car before going up to McNamara's?
A. Yes sir.
Q. 118. What did you leave the car for before going to McNamara's?
A. Just walked up the street was all.
Q. 119. McNamara's is a bar room is it not?
A. Yes sir.
Q. 120. On what Street?
A. Spring Street.
Q. 121. How did you happen to do that?
A. Just happened to walk down.
Q. 122. Just went back and looked into it?
A. I looked into it.
Q. 123. Who was in there?
A. I don't know.
154 Q. 124. Ida Wilson?
A. I don't remember.
Q. 125. Women there?
A. May have been.
Q. 126. Did you not see women——
A. I know Mary Allen, I don't know whether she is a woman or what she is.
Q. 127. And Go Devil stayed in the car?
A. Yes sir.
Q. 128. Where did he get on the car?
A. At the track.
Q. 129. Did you see him in it?
A. Yes sir.
Q. 130. Why didn't you go in?
A. I was in.
Q. 131. Where did you get out?
A. In the yard.
Q. 132. How long did you stay there?
A. I walked on up the street and then came to McNamara's and came back.
Q. 133. What time did the car get in the yard?
A. About a quarter to eight; left there about half past seven, I guess.

Q. 134. After you came down there, then you walked on up to McNamara's?
A. Yes sir.
Q. 135. And left Go Devil in the car?
A. Yes sir.
Q. 136. When did you go back to the car?
A. Only stayed there about ten minutes, and then went back.
Q. 137. What time was that?
A. About five or ten minutes of nine.
155 Q. 138. Where did you find Go Devil?
A. At the car.
Q. 139. Out or in?
A. In.
Q. 140. What was he doing?
A. Standing up in the door.
Q. 141. When were these lanterns lighted?
A. At the shoot.
Q. 142. Who lighted them?
A. He lit one and I lit one.
Q. 143. Who put the wires up?
A. I put one and Mr. Gaines put one.
Q. 144. Who is Mr. Gaines?
A. Bob Gaines, a colored man.
Q. 145. Where is he?
A. He is here.
Q. 146. What sort of nails did you use?
A. Ten penny nails.
Q. 147. Where did you get them?
A. Mr. Gaines' stable.
Q. 148. Where did you get them from?
A. He had some laying in the stall.
Q. 149. What did you drive them with?
A. Hatchet.
Q. 150. Where did you get the hatchet?
A. He had the hatchet and wire fixtures; they were driven in the wall about half and clinched over and the wire wrapped around them about half way and clinched in the wall.
Q. 151. Was the wire wrapped around them before they were clinched or after?
A. They were driven in and then clinched.
156 Q. 152. How long was the pieces of wire?
A. About—I don't exactly know how long they were.
Q. 153. Ten feet?
A. Yes sir, about.
Q. 154. Each piece of wire was about ten feet?
A. Yes sir.
Q. 155. Now show the jury how you did it, with your fingers?
A. Well, we wrapped it around on each side of the lantern this way and then that way, and four ways.
Q. 156. What part of the lantern was wrapped around?
A. Around the frame part of the lantern, the sides of it.

Q. 157. Didn't run through the handle?
A. No sir.
Q. 158. Each piece of wire was wrapped around the frame of the lantern?
A. Yes sir.
Q. 159. At the top or bottom?
A. At the bottom.
Q. 160. What was in the lantern?
A. Coal oil.
Q. 161. Who put it in?
A. Mr. Mahoney.
Q. 162. Did you see it put in?
A. No sir.
Q. 163. How are these lanterns,—how is the bottom fastened in?
A. They are all sortered in, can't get out.
Q. 164. How do you light them then?
A. By pushing the globe up.
Q. 165. There is no way then for the bottom to come out, without it is either broken or——
157 A. Yes sir.
Q. 166. Who put the other wire up in the other aisle?
A. Mr. Bob Gaines.
Q. 167. Did you see him do it?
A. Yes sir.
Q. 168. How was that done?
A. The same way.
Q. 169. Did you help him?
A. No sir; but I seen it, it was done the same way.
Q. 170. You looked at it?
A. Yes sir.
Q. 171. When?
A. After we had done it; they were both about the same way, clinched with nailes.
Q. 172. Where did he get his nails?
A. He had them in his stable.
Q. 173. And both of you got in the car?
A. Yes sir.
Q. 174. When was that?
A. After we got loaded, about half past six.
Q. 175. Where was Mr. Ireland then?
A. He was gone.
Q. 176. After you got down there you said you got into the car and some man came and brought you what?
A. After I come from McNamara's a fellow came and brought me a bill.
Q. 177. How long did you stay at McNamara's?
A. Ten or fifteen minutes; I just walked up the street.
Q. 178. Went in didn't you?
A. Yes sir.
Q. 179. And then you went where?
A. Back to the car.

158 Q. 180. Did you get the bill at the car?
A. Yes sir, got that bill at the car.
Q. 181. What kind of looking man was it that gave you the bill?
A. Don't remember what kind of man it was now.
Q. 182. Is this the bill he gave you?
A. Yes sir.
Q. 183. And what time did the train pull out of there?
A. About nine or 9:25.
Q. 184. What time did you go to sleep?
A. About five miles, I reckon.
Q. 185. What did you go to sleep on?
A. Some loose hay.
Q. 186. Where was that loose hay?
A. In the front aisle.
Q. 187. You mean the aisle next to Lexington?
A. The aisle going towards Louisville.
Q. 188. Did you notice whether that hay—one bale had been broken and some had been fed to the horses and left,—how far from the side of the door was it?
A. Right by the side of the door on the left hand side as you go down.
Q. 189. How much of that bale of hay was left there loose?
A. About half of it.
Q. 190. What beds did you have in there?
A. Saw dust.
Q. 191. Did you see that bed in there?
A. No sir.
Q. 192. Was it damp at all?
A. Not that I know of.
Q. 193. Perfectly dry?
A. I don't know.
159 Q. 194. Do you recall the conductor wanting that bill of lading?
A. A fellow brought it to me.
Q. 195. Didn't the conductor ask you to show him the bill of lading for the horses?
A. No sir.
Q. 196. And didn't you refuse to let him have it?
A. No sir.
Q. 197. That did not occur at all?
A. No sir.
Q. 198. Didn't he ask you to let him see it at all?
A. No sir.
Q. 199. Didn't anybody ask you to let them see it?
A. No sir.
Q. 200. And you never handed it to anybody?
A. No sir.
Q. 201. You are perfectly positive of that?
A. Yes sir.
Q. 202. You were asleep about five miles out of town?

A. Yes sir.
Q. 203. On that loose hay, and you spread it so as to make a good bed, of course?
A. Yes sir.
Q. 204. What did Go Devil do?
A. Go Devil was in the other room.
Q. 205. Well, did he stay up or go to sleep?
A. I don't know, but I think he stayed up; I don't think he laid down: he was sitting on the oats when I went to sleep.
Q. 206. What were the oats in?
A. In a sack.
Q. 207. What became of that lantern?
A. The one that was busted?
160 Q. 208. Was it busted,—what became of it?
A. I don't know sir, a piece of it hung there the next day a piece of the frame.
Q. 209. The handle?
A. No sir, the side of it.
Q. 210. Did you run the wire through the handle at all?
A. No sir.
Q. 211. What became of the other part of the lantern?
A. It knocked into the end of the stall there, knocked the bottom of it into the stall.
Q. 212. What was in there?
A. Just the bottom of the lantern.
Q. 213. Who first found out about the fire, you or Go Devil?
A. Me.
Q. 214. What did you do?
A. I jumped up and tried to put it out.
Q. 215. Ain't it a fact that Go Devil tried to pull you out of the fire?
A. No sir.
Q. 216. You are perfectly positive of that?
A. No sir.
Q. 217. You hollered to him first?
A. Yes sir.
Q. 218. What did he say?
A. He said he was fixing to light the lantern.
Q. 219. Was he awake?
A. Yes sir.
Q. 220. What was it first woke you up?
A. Bumping of the car.
Q. 221. Where were you, do you know?
A. About two miles the other side of Frankfort; the car had crossed the bridge.
Q. 222. And gone how far?
161 A. About two miles, I guess.
Q. 223. Was it still moving?
A. When we jumped out it was moving.
Q. 224. How far the other side of the end of the bridge were you?

A. About a mile.

Q. 225. You had left the yard and were going,—at what rate of speed were you going?

A. Just was moving off.

Q. 226. It had left the yard and was moving off?

A. It was leaving the yard and going in the direction of Louisville.

Q. 227. How long had you wakened up?

A. Just as it bumped it was moving off.

Q. 228. And then after the switching had been done the train was moving off towards Louisville?

A. Yes sir.

Q. 229. How can you state that now?

A. The engine bumped into the car.

Q. 230. Why you say the engine and car was moving towards Lexington?

A. The engine and car had been switching in the yard.

Q. 231. Didn't you say when you first discovered it the train was moving off towards Louisville, and had gone about a mile?

A. No sir.

Q. 232. You did not say that?

A. No sir.

Q. 233. When did you first discover it?

A. The bumping of the car, it woke me up.

Q. 234. Where was it then?

A. It had just begun to move off, after it had coupled into our car.

162 Q. 235. Just begun to move?

A. Yes sir, it had bumped into our car and then began to move.

W. 236. Is that what woke you up?

A. Yes sir.

Q. 237. Where was the lantern?

A. Lying in one end of the stall.

Q. 238. Is it not a fact that the train men came there and had to break in the door and go into you?

A. No sir.

Q. 239. That they called to you and broke open the door in order to get to you?

A. No sir; he busted the door after we got into the train.

Q. 240. What did he bust the door open for then?

A. He busted the door open where the fire was at.

A. 241. Which end was that?

A. The end towards Louisville.

Q. 242. He burst that door open after you all had stopped the train?

A. Yes sir.

Q. 243. They had never hollered to you?

A. No sir.

Q. 244. Nobody?

A. No sir.

Q. 245. Never knocked on the door?
A. No sir.
Q. 246. Never hollered to you?
A. No sir.
Q. 247. What did Go Devil say to you when you woke him up, what was it he said?
A. I called him and he said "Wait until I light my lantern."
Q. 248. Where was he riding at that time?
A. Lighting his lantern.
163 Q. 249. Was his light out?
A. Yes sir.
Q. 250. That is in the end towards Lexington?
A. Yes sir.
Q. 251. You say the train men didn't know anything about the fire at all?
A. Until we stopped the train.
Q. 252. And then you jumped out and had a talk with the engineer and fireman, and what was it you told them?
A. They asked how did it happen and I told them they bumped into the car, and that said, "No such damn thing."
Q. 253. And then you said something about the horses didn't you?
A. Well, they asked the names of the horses; I wanted to go up and get out the horses and asked him what he was going to do and said get the horses out of here, he said, "What are you going to do, let them all burn up."
Q. 254. Who said that?
A. Horace Moore.
Q. 255. What did they say then?
A. Didn't say anything then.
Q. 256. Where was the conductor?
A. They were standing there; I gave him my name and the horses' name.
Q. 257. And then you made them help you get these horses out?
A. Yes sir, they helped to put the fire out; we jumped the horses off ourselves.
Q. 258. When you first say that fire, how much fire was in there?
A. It was just beginning to blaze up good.
164 Q. 259. Why didn't you put it out?
A. I couldn't put it out; the saw dust had gotten in such a light blaze I couldn't put it out; I couldn't do any good.
Q. 260. Didn't you have a bucket of water there?
A. No sir.
Q. 261. Couldn't you smother it?
A. No sir, I tried to do that.
Q. 262. Where was that fire exactly?
A. In a corner of the stall, right under the horses.
Q. 263. In the corner of the stall?
A. Yes sir.
W. 264. What stall?
A. Right in there in the corner stall.

Q. 265. In the corner right hand stall?
A. Yes sir.
Q. 266. Right up in the north corner there?
A. Right there, (pointing to diagram).
Q. 267. That would be the right hand corner of the Louisville end of the car?
A. Yes sir.
W. 268. In that stall?
A. Yes sir.
Q. 269. And there was where the fire was?
A. Yes sir.
Q. 270. Where were you, over at the other side?
A. I was there, yes sir.
Q. 271. And this fire was between the corner and the side of the car and the horses, was it?
A. No sir, the fire was right there.
Q. 272. Right up in the corner is what you said?
A. Yes sir.
165 Q. 273. What was there in that corner?
A. Nothing but saw dust.
Q. 274. You couldn't put it out?
A. No sir, the oil had split and made it go right up.
Q. 275. How far is that point where you say the fire was from the center of that aisle beneath where the lantern was hanging?
A. I don't know exactly how far it is.
Q. 276. How wide are those stalls?
A. I don't know how wide the stalls is.
Q. 277. How wide is the aisle?
A. About twelve feet, I guess.
Q. 278. How?
A. I don't know, I won't say.
Q. 279. How wide was the stall, about?
A. The stalls was just half way between the cars.
Q. 280. How wide was that stall?
A. It was about twice as wide as that table is.
Q. 281. How wide would you say that table is; I want to get the distance?
A. About three feet.
Q. 282. Well then you would make the stall about six feet wide, and you say the aisle was about twelve feet wide you say?
A. Yes sir.
Q. 283. So then from the center of the aisle beneath the lantern across that stall to where that fire was, would be, according to your idea, about twelve feet?
A. I don't know sir how far that is.
Q. 284. Were you burned?
A. Yes sir, on the ear.
Q. 285. And you ran over in here (pointing to diagram), and tried to put it out?
A. Yes sir.
166 Q. 286. How did you get burned?
A. Trying to put the fire out.

Q. 287. Over here?
A. Yes sir.
Q. 288. You didn't get burned while you were asleep?
A. No sir.
Q. 289. There wasn't any fire in there?
A. Not in that aisle.
Q. 290. You ran to stall—what horse was there?
A. Star Shoot, Blue Danube.
Q. 291. You are entirely positive of that are you?
A. Yes sir.
Q. 292. And you were not pulled out of the car or wakened up?
A. No sir.
Q. 293. That you are perfectly positive of?
A. Yes sir.
Q. 294. What is your nick name?
A. Haven't got any.
Q. 295. Didn't give you "Come Devil," then?
A. No sir.

Redirect examination:

Q. 1. Chester, you say that the door that the railroad men undertook to burst, was the right hand door on the side of the car next to the Louisville end of the car?
A. Yes sir.
Q. 2. When did they undertake to burst open that door?
A. After we had jumped out and stopped the train.
Q. 3. Why were they trying to burst open that door, do you know?
A. They were trying to get to the fire, I guess; I don't know anything else, so we could jump the horses off.
167 Q. 4. What were they trying to burst open that door with?
A. I don't remember what they had.
Q. 5. Col. Thornton has asked you if you were burned trying to put the fire out,—was there a photograph taken of you after that fire showing the burns upon you?
A. Yes sir.
Q. 6. Where was that taken?
A. Here in Lexington.
Q. 7. Do you remember when it was taken?
A. I don't remember the dates or the day.
Q. 8. Who took it?
A. I don't know the gentleman's name.
Q. 9. Who was present when it was taken?
A. You and Mr. Ireland and myself.
Q. 10. Do you remember the name of the man who took the photograph?
A. No sir.

Recross-examination:

Q. 1. One question I forgot to ask you, do you recall a man whose name,—I don't know that you recall Mr. Veenaman?
A. No sir.

Q. 2. Is that your handwriting?
A. Yes sir.
Q. 3. Didn't you make that in the presence of a man who took your statement?
A. Yes, that is my handwriting.
Q. 4. That is your handwriting, did anybody read it to you?
A. No sir.
Q. 5. Didn't you tell that man that you didn't take but two glasses of beer; that you took one at Covington with Horace, or Go Devil, and the other about one in Lexington?
168 A. No sir.
Q. 6. You did not say that at all?
A. No sir.
Q. 7. You are perfectly positive of that?
A. Yes sir.
Q. 8. If that is in here it is not right?
A. No sir.
Q. 9. That is your handwriting?
A. No sir.

Redirect examination:

Q. 1. Have you read the paper presented to you by Col. Thornton that he asked you if you signed?
A. No sir, I never read it.

WITNESS: What date is that? (Speaking to the defendant's Counsel.)
COUNSEL: December 3rd, Lexington, Ky., 1910.

A. I made a statement to a man who came there and said he was Mr. Franklin's man and Mr. Franklin sent him.

COUNSEL FOR PLAINTIFFS: Will you examine that paper and see if that is the statement you made to Mr. Veenaman?
COUNSEL FOR DEFENDANT: I will let him see it but I do not want to put it in evidence now.
COUNSEL FOR PLAINTIFFS: Well, we do not insist.
COUNSEL FOR DEFENDANT: You say that paper was read to you?

A. No sir.

Adjourned to meet at nine o'clock, December 20th.

Met pursuant to adjournment.

169 MOORE, HORACE, (Col.) who having been first duly sworn testified on behalf of the Plaintiffs as follows:

Q. 1. What is your name?
A. Horace Moore.
Q. 2. Where is your home?
A. Well my home is in Frankfort, Ky.; I have been living in Lexington about fourteen years.
Q. 3. What has been your employment in Lexington here?
A. With race horses.
Q. 4. How long have you been employed with race horses?

A. About eleven years.
Q. 5. Who did you work for in 1910 with race horses?
A. Mr. Ireland.
Q. 6. What Mr. Ireland?
A. Mr. John T. Ireland.
Q. 7. This gentleman?
A. Yes sir.
Q. 8. Where were you employed with him during that year?
A. At Latonia.
Q. 9. Anywhere else?
A. But here.
Q. 10. Anywhere else?
A. Mexico.
Q. 11. Did you know Mr. Catesby Woodford?
A. I never knew him until after I went to work for Mr. Ireland.
Q. 12. Did you know a Star Shoot, Last Cherry colt that belonged to Messrs. Woodford and Ireland?
A. Well, I knew him the day we shipped; that is the onliest time I seen him.
Q. 13. You saw him then?
A. Yes sir.
170 Q. 14. Describe the colt you saw that day, the Star Shoot Last Cherry, as nearly as you can?
A. He was a large chestnut colt with flaxen mane and tail.
Q. 15. Did you know a Star Shoot, Blue Danube colt?
A. Yes sir.
Q. 16. How long had you known him?
A. Just knew him that day too.
Q. 17. Did you know a Miller, Lady Beth filly?
A. Yes sir.
Q. 18. How long had you known her?
A. Just that day.
Q. 19. A Miller Lady Premier filly?
A. Yes sir.
Q. 20. How long had you known her?
A. Just that day.
Q. 21. Had you known an Ethelbert, Miss Wicks filly?
A. Yes sir.
Q. 22. How long had you known her?
A. Just that day.
Q. 23. Know a Jack Point, Lady Vincent colt?
A. Yes sir.
Q. 24. How long had you known him?
A. Just that day.
Q. 25. Did you know a Star Shoot, Amy Davenport colt?
A. Yes sir.
Q. 26. How long had you known him?
A. Only that day.
Q. 27. Did you help load those colts on the cars?
A. Yes sir.
Q. 28. Where?
A. Out at the shoot, out by the track.

171 Q. 29. Who was present at the time?
A. Mr. Ireland, Mr. Bill Lewis and Mr. Gaines.
Q. 30. Any one else?
A. The fellows that was rubbing for Mr. Lewis brought them to town; I don't know who they were.
Q. 31. Any one else?
A. No sir, only Chester.
Q. 32. Do you recall what time you began to load the horses?
A. Yes sir.
Q. 33. What time?
A. About a quarter after six.
Q. 34. About a quarter after six?
A. Yes sir.
Q. 35. Do you know what time you finished shipping?
A. No, not exactly, because I didn't have any watch.
Q. 36. Do you remember about the car being placed up there, what time it got there?
A. What time the engine got there?
Q. 37. No, the car?
A. Placed out at the shoot, I don't know when it was placed there.
Q. 38. Where had you been that day before you went to the track?
A. Well, I got here about twelve o'clock from Covington.
Q. 39. Who came with you?
A. Chester.
Q. 40. When you got here where did you go?
A. I went straight on out to the east end.
Q. 41. Do you know where?
A. Out to Mr. Mahoney's saloon.
Q. 42. What time did you get to the track?
A. Went right up after we e-t dinner.
172 Q. 43. Who did you report to at the track?
A. We went to see Mr. Gaines.
Q. 44. Bob Gaines?
A. Yes sir.
Q. 45. These colts,—how many did you put on that car, how many horses?
A. Eight.
Q. 46. Well, Marsand was one horse you put on the car?
A. Yes sir.
Q. 47. That particular animal is not in the suit—the others you put in are the same ones I have asked you about?
A. Yes sir.
Q. 48. Describe to the jury, please, how the car was bedded, for the reception of these animals?
A. It was bedded with sawdust.
Q. 49. What was put in the car besides the horses?
A. A box, about seven tubs and two sacks of oats, about three bales of hay.

Q. 50. Can you tell the jury how that car was stalled off for the reception of these horses?

A. I think I can.

Q. 51. Can you take that diagram and describe it?

A. Yes sir, this end is going to Louisville, and there is a colt in here.

Q. 52. Which stall?

A. Right here, the left hand stall at the Louisville end; and this is the right hand side; there is a colt standing in there.

Q. 53. Estimating this to be the Arms Palace horse car, upon which these animals were loaded, this is the Louisville end of the car?

173 A. Yes sir.

Q. 54. This is a stall in the right hand Louisville end of the car?

A. Yes sir.

Q. 55. This is a stall in the left hand end of the Louisville car?

A. Yes sir.

Q. 56. This is the aisle between the doors, one on each side of the right and left hand end- of the car as it goes to Louisville?

A. Yes sir.

Q. 57. This is a stall on the left hand side of the car as you go to Louisville?

A. Yes sir.

Q. 58. And this is a stall on the right hand side of the car as you go towards Louisville and begins a partition or divides that car about the middle and this is a door?

A. Yes sir.

Q. 59. Opening from the right hand side stall on the Louisville side is that partition, in which is the right hand side stall on the Lexington side of the partition?

A. Yes sir.

Q. 60. This is the stall on the left hand side and Lexington end of that partition?

A. Yes sir.

Q. 61. This is a stall between the two doors, one on each side of the car, and this is two stalls in the Lexington end of the car?

A. Yes sir.

Q. 62. Now do you remember how these horses were loaded in that car?

A. Yes sir.

174 Q. 63. If you remember, tell the jury that was in the right hand Louisville end, corner stall of the car?

A. The colt, Star Shoot; I don't know his dam, but it was a Star Shoot colt.

Q. 64. What was in the left hand corner stall of the Louisville end of the car?

A. That was the Blue Danube colt.

Q. 65. What was in the aisle between the two doors in the Louisville end of the car?

A. The hay, and Chester was in there.

Q. 66. Anything besides hay and Chester?
A. No sir.
Q. 67. Did you have anything there to feed the horses with other than hay in that car?
A. We had oats but we didn't feed them oats when we shipped.
Q. 68. Was there any oats in Chester's end that you recall?
A. No sir, the oats was in my end.
Q. 69. What was the horse in the left hand side of the car that was between the aisle and partition?
A. That was the Miller filly.
Q. 70. What was in the stall on the right hand side and next to that partition, in the Louisville end of the car?
A. That was a Miller filly.
Q. 71. What was in the stall into which the door through the partition from the Louisville and the Lexington end opened?
A. Marsand.
Q. 72. What was in the stall on the left hand side?
A. Ethelbert filly.
Q. 73. What was in that aisle?
A. Myself and two sacks of oats and a large box, and about seven tubs.
Q. 74. What was in the right hand Lexington end of that car?
A. A Big colt by Star Shoot.
175 Q. 75. What was in the left hand end, Lexington end, of that car?
A. Jack Wainwright, Jack Point colt.
Q. 76. What time did you boys get on the car?
A. I got on it about seven o'clock.
Q. 77. What time was the loading finished—were there any lanterns put in that car?
A. Two.
Q. 78. Where were those lanterns placed?
A. Right in the center here, right in the aisle.
Q. 79. In each end of the car one lantern?
A. Yes sir.
Q. 80. The partition between?
A. Yes sir.
Q. 81. Who put those lanterns up, do you remember?
A. Mr. Gaines and Chester, Bob Gaines.
Q. 82. Which of the lanterns did Bob Gaines put up, do you recall that?
A. I think he put it in my end, the lanterns.
Q. 83. What did he do with reference to those lanterns and the putting up of them?
A. He got a wire and was showing us how to put them up.
Q. 84. Do you know how they were put up?
A. Yes sir.
Q. 85. Tell the jury how they were put up?
A. There was a little piece running down from the center, and we had a ten penny nail driven and bent over the handle; and we had a wire four ways, one this way and one that way.

Q. 86. Both put the same way?
A. Yes sir.
Q. 87. Had you traveled in cars with horses before that time?
A. Yes sir.
176 Q. 88. How long?
A. About ten years.
Q. 89. Where did you travel with them?
A. Here to St. Louis and from St. Louis to Kansas City and California and all the state to Seattle.
Q. 90. Do you know the usual manner in which cars were prepared for shipping horses, with reference to hanging the lanterns?
A. Yes sir.
Q. 91. Well, with reference to the usual custom of doing these things, how were those lanterns hung?
A. These were hung like any one else hangs them that ships.
Q. 92. Do men usually go in the cars at night with horses?

Defendant objects which objection is sustained by the Court.

Q. 93. State what is the custom with reference to men traveling or not traveling in cars with horses that are shipped from one point to another?
A. I never understood you.
Q. 94. Read the question please, (which the Stenographer does.)
A. The man goes in the cars with horses when they are shipped.
Q. 95. Were those lanterns lighted?
A. Yes sir.
Q. 96. When were they lighted?
A. They were lit about fifteen minutes of seven, I suppose.
Q. 97. Where?
A. Out at the shoot?
Q. 98. Who was present?
A. Mr. Bob Gaines, Mr. Lewis, myself and Chester.
Q. 99. How long did that car remain at the shoot before it was removed from there?
A. About three-quarters of an hour.
Q. 100. Who, if any one, was in the car when it left there?
177 A. Myself and Chester.
Q. 101. Where was that car taken to?
A. Taken down in town to the yards.
Q. 102. Where are the yards?
A. Back down in there below Patterson Street.
Q. 103. Who was in the car when it got there?
A. Chester and I.
Q. 104. Did that car stop on the way between the shoot at the track and the yards?
A. Only switched to get down in town; it stopped out there by the freight house.
Q. 105. How long did it stop there?
A. O, about three or four minutes.
Q. 106. Do you remember about what time it got down in the yards?

A. Yes sir, I noticed the clock when we came down in town here from the Catholic Church; I think the Catholic Church up on Main Street.

Q. 107. If you know about what time it was when you got there, tell the jury?

A. Five minutes after eight.

Q. 108. How long did you remain there in that car?

A. I never did get off of it.

Q. 109. Did Chester stay there?

A. No, he got off.

Q. 110. Do you know where he went?

A. No sir.

Q. 111. Do you know about how long he was gone?

A. Looked like he was gone about fifteen or twenty minutes.

Q 111. When he came back—did you see him when he came back?

A. Yes sir.

Q. 113. Do you remember what time that car left there?

A. Yes sir.

178 Q. 114. What time?

A. About ten or fifteen minutes to nine.

Q. 115. Did any one go to the car before it left there?

A. No one, but a man with a bill of the car.

Q. 116. Do you know who that man was?

A. No sir, I wouldn't know him if I were to see him.

Q. 117. What did you do with the bill?

A. He gave it to Chester.

Q. 118. How do you know?

A. Because I was standing in that door, back towards this way on the right hand side.

Q. 119. Where was Chester?

A. He was standing in his door.

Q. 120. How was his door, which end?

A. The door in his end towards Louisville, right hand side.

Q. 121. How long after that before the train pulled out?

A. It wasn't very long.

Q. 122. What did you do with reference to your doors when the train pulled out?

A. Closed them.

Q. 123. Then what did you do?

A. Chester he laid down I suppose, and I sat on a sack of oats in my end.

Q. 124. Do you know what happened after that?

A. Yes sir.

Q. 125. State to the jury, these gentlemen, what happened, and when it happened and where, if you know?

A. What happened,—the car got on fire by a bump.

Q. 126. Where?

A. On the other side of Frankfort.

Q. 127. Where were you at the time of the bump?

A. I was sitting by the door on a sack of oats.

179 Q. 128. What did it to to you?

A. It knocked me off the sack.

Q. 129. What was the condition of your lantern at the time the bump came and jolted you?

A. My lantern went out when the car was bumped.

Q. 130. Tell the jury what occurred in that car after the bump, and your lantern went out?

A. After the car bumped, why I got up and lit my lantern and this boy, Chester, hollered and I told him to wait until I lit my lantern. He said, "this end is on fire," and then I jumped down and went and opened the door and let him through.

Q. 131. Which door?

A. The door on the right hand side, the door in the aisle that carries you through from one end of the car to the other.

Q. 132. The door in the partition?

A. Yes; and then he run out and I opened the other door on the right hand side and he jumped out, and when he got out the Miller filly came out of my end.

Q. 133. Where did she go to?

A. She stood besides the other horses in the stall.

Q. 134. You have told about how Chester jumped off, was the train moving or standing still, when you and Chester got off?

A. Moving still.

Q. 135. What did you do when you got off?

A. Commenced to holler and they stopped.

Q. 136. And then what happened?

A. He asked me——

Q. 137. Who was "he"?

A. I don't know.

Q. 138. Where did he come from?

A. I don't know.

Q. 139. How long after it stopped?

180 A. It stopped right away after we jumped off.

Q. 140. How long after it stopped before he asked you something?

A. We hollored and he stopped right away; he jumped off the engine and he asked me what is the matter down there, and I said the car is on fire; he said, "how did it happen," I said "by the bumping which knocked the lantern down there"; he said "nothing like that," you darkeys have been smoking cigarettes in there." I said, "no, nobody in there been *som*king cigarettes;" He said, "What in the hell are you going to do." I said "get these horses out of here, are you going to stand and let them burn up." Then we commenced to get the horses out.

Q. 141. Where were you when you commenced to do that?

A. I was at the door in my end of the car, and I took the bar down and jumped them out.

Q. 142. How many did you jump out?

A. I jumped out five or six altogether, after the fire got in the other end I got one from there, the Blue Danube colt.

Q. 143. While you were doing that what were the train men doing?

A. As I was jumping them out, they didn't want to lead them, one of them did hold them and Chester was holding them and pushed them out the best we could; they was so scared they didn't want anybody to hold them.

Q. 144. How did the horses act?

A. They groaned and hollered and kicked and fought and tried to get out and they couldn't get out.

Q. 145. Were there any horses left in the car?

A. Yes sir.

Q. 145. In which stalls were those horses?

A. This colt that stood in his stall here, he had been moved from here back to this stall.

Q. 146. And which stalls were they in when you left that car, there at Frankfort?

A. He was in this stall, this colt standing here; they were supposed to be standing side by side before it moved.

181 Q. 147. Then the two stalls in the left hand side on the left hand end of the car and on the side of the partition in the car, each had a horse in it?

A. Yes sir.

Q. 148. Now where did you go with the horses when you got them out?

A. We taken them to the livery stable.

Q. 149. Do you remember who went with you?

A. No sir, a little fellow showed us the way. I never was in Frankfort before.

Q. 150. How many horses did you take?

A. We taken six.

Q. 151. Do you remember who led the horses?

A. One fellow led a horse that I don't know who he was.

Q. 152. Did you see anybody on the way, as you went along?

A. I met a policeman.

Q. 153. Where did you meet him?

A. I met him coming from the depot down below the Capital Hotel.

Q. 154. Where did you go with the horses?

A. We taken them up by the Capital Hotel, right across from the hotel, to a livery stable.

Q. 155. Do you remember whose livery stable that was?

A. No sir.

Q. 156. Was it the one immediately opposite the front of the Capital Hotel?

Defendant objects.

Q. 157. Well, tell the jury where the livery stable was?

A. In front of the Capital Hotel, and we taken them there and this police went back with us and this boy went over to the Capital Hotel and telephoned Mr. Woodford.

Q. 158. Who was that boy?

182 A. Chester.

Q. 159. Did you see anybody else about the Capital Hotel or the livery stable?

A. I seen the hands around the livery stable, and I seen a young fellow at the Capital Hotel.

Q. 160. Do you know his name?

A. No sir.

Q. 161. Who was with you at the time you saw the young fellow at the Capital Hotel?

A. The police, well I don't know the gentleman's name, but just a tall fellow.

Q. 162. Anybody else besides the police and the gentleman you didn't know, the tall fellow.

A. No sir.

Q. 163. What time did Chester with you get to the livery stable?

A. He went over to the livery stable to telephone to Mr. Woodford.

Q. 164. Did you go to-?

A. Yes sir.

Q. 165. Do you know what time that car was wrecked?

A. I don't know exactly what time it was wrecked, but I can tell about what time it was when we got to the livery stable.

Q. 166. What time was it?

A. Five minutes to one.

Q. 167. Do you know Dr. Seay of Frankfort?

A. When I see him.

Q. 168. Did you see him there?

A. I seen him there that night.

Q. 169. Did you see any other man now whom you can name?

A. No sir, I can't name him, but I could tell him if I saw him.

183 Q. 170. Do you know Mr. Pat Lillis?

A. No sir.

Q. 171. Do you know Mr. J. B. Martin, of Frankfort?

A. No sir.

Q. 172. Did you see more than one policeman that night?

A. Yes, sir, I saw two policemen.

Q. 173. What kind of looking men were they?

A. One looked to be a young fellow, dark haired, and the other an old gentleman, got gray hair.

Q. 174. Where is he?

A. I suppose he is here, I seen him here yesterday both of them.

Q. 175. Do you know who Chester telephoned to?

A. Yes sir.

Q. 176. Who did he?

A. He telephoned to Mr. Woodford, and he telephoned Dr. Shannon.

Q. 177. What other person was about there other than yourself, when he did that telephoning?

A. Why, there was a policeman and myself and a paper reporter.

Q. 178. Do you know the name of the paper reporter?

A. No sir, don't know his name, but I know him when I see him.
Q. 179. Have you seen him there since the trial begun?
A. Yes sir, this morning.
Q. 180. Anybody else?
A. No more than the colored fellow who worked at the hotel.
Q. 181. Have you told us all now that you recall who were present at the time of this telephoning?
A. Well, I think I have; if there was any more I didn't see them.
Q. 182. To refresh your recollection, wasn't the Clerk of the hotel there?
A. I suppose he was.

184 Defendant objects, which objection is sustained by the Court.

Q. 183. Well, did you see him?
A. No sir, I didn't see him.
Q. 184. Now tell the jury how these five horses were burned?
A. Why, one of the fillies was all burned across the back; and all of them most their foretop was burned off of them.
Q. 185. What became of the six, not counting Marsand, what became of the other five that were taken over to that livery stable?
A. Mr. Ireland has them in Mexico.
Q. 186. All five of them?
A. No sir, there is one turned out here.
Q. 187. Did any of those horses die?
A. Why, there was two of them they killed.
Q. 188. What about those over at the stable?
A. Well, no sir, there was one of them they had to kill the next morning, the Blue Danube colt.
Q. 189. Do you know the size of that?
A. No sir, I don't know the size of any of them.
Q. 190. What did they kill it for?
A. They had to kill it, it was burned so bad.
Q. 191. Where was that killed?
A. Right in the livery stable.
Q. 192. So that left four at livery stable, did it?
A. That left five at the livery stable.
Q. 193. That is counting Marsand, I have asked you to exclude him.
A. That left four.
Q. 194. What became of the others, you said there were eight in the car when you started?
A. The others were burned so bad we couldn't take them out of the car.
Q. 195. Were you back there the next morning?
185 A. I was back there the same night and the next morning, too.
Q. 196. Whom did you go back there with?
A. With a policeman, the youngest one.
Q. 197. Would you know his name if you heard it called?

A. No sir, I believe not; I don't know that I ever heard his name called.

Q. 198. Has he been here to testify in this case?

A. Yes sir.

Q. 199. What time did you go back with him over there?

A. I don't know what time it was when I went back.

Q. 200. What did you find when you got over there?

A. The two horses.

Q. 201. What else?

A. The stuff we throwed off, so we could get the horse off.

Q. 202. Well, did you see your lantern hanging there?

A. I seen the bottom of one where it had been hanging.

Q. 203. Where was it?

A. In the stall, in the right hand side going towards Louisville, in the Star Shoot colt.

Q. 204. In the stall you mean?

A. Right in the stall where the lantern was knocked to.

Q. 205. You saw that there?

A. Yes sir, I seen one piece of the frame hanging on this wire.

Q. 206. Did you notice the condition of the wires?

A. Yes sir.

Q. 207. Tell the jury how they were then?

A. The wires were still there.

Q. 208. All the wires?

A. No sir, only two of them; two of them this way was holding this piece; the other two were knocked down with the frame of the lantern.

Q. 209. Where was your lantern?

A. I taken it down to see how to get the horses out.

186 Q. 210. Did you find the colts in the stall when you got back to that car over there, you and the policeman that night?

A. No sir, we found them standing out of the stall.

Q. 211. Where were they when you got back, if you recall?

A. He was standing right in front of this aisle here and this filly was back up around here.

Q. 212. Did you leave them there?

A. Yes sir, had to leave them there.

Q. 213. How long did you stay there that trip?

A. All night, until the next evening——

Q. 214. I mean over at that car?

A. About half an hour.

Q. 215. And where did you go?

A. Went back to the livery stable.

Q. 216. Who did you see when you went back there?

A. I seen Dr. Seay and this other heavy set fellow and a policeman and a fellow that works there; he is here now.

Q. 217. What was done for these horses that night?

A. They bought new blankets for all of them and greased them at the places that they were burned, and they were doctoring on them.

Q. 218. Who looked after that?

A. Dr. Seay until Dr. Shannon got there.
Q. 219. What Dr. Shannon is that?
A. His office is on Short Street.
Q. 220. Does he live in Lexington?
A. I couldn't say, his office is in Lexington but I have seen him around here quite often.
Q. 221. What time did he get down, do you remember?
A. No sir, I don't know but he said he run down there in about an hour and a half, or two hours.
Q. 222. How long did you stay in the City of Frankfort?
A. I stayed there plumb up until that night.
187 Q. 223. Do you know what became of the two horses that were left in that car over there, when you and the policeman came away?
A. We left them in the car.
Q. 224. Do you know what became of them after that?
A. After that they was killed.
Q. 225. How do you know?
A. Because I seen the filly killed.
Q. 226. Had you been acquainted with any of those horses before they were loaded on this car out here?
A. No more than from moving them from the stable to the car and loading them.
Q. 227. After this accident at Frankfort, were you acquainted with these colts and fillies?
A. Yes sir.
Q. 228. Where?
A. Here and Mexico.
Q. 229. And for how long a time?
A. For a year.
Q. 230. Tell the jury the disposition of the colts, after they were burned?
A. After they were burned, they were always hard to bridle and crazy about the head, as crazy as they could be.
Q. 231. Do you know where they are now?
A. Yes sir.
Q. 232. Where are they?
A. In Mexico all but one.
Q. 233. Where is that one?
A. He is here at some one's farm.
Q. 234. Here in Kentucky?
A. Yes sir.

188 Cross-examination:

Q. 1. You are generally known by the name of Go Devil? I believe, are you not?
A. Yes sir.
Q. 2. How long have they been calling you Go Devil?
A. Ever since I have been on the race track, eleven years.
Q. 3. You go generally by the name of Go Devil?
A. Yes sir.

Q. 4. Go Devil, how old were you on the 17th day of November, 1910?
A. I was twenty-two.
Q. 5. How old are you now?
A. Twenty-three.
Q. 6. How do you know you were twenty-two?
A. How do I know I am twenty-two?

Plaintiffs object.

Q. 7. How do you know how old you were?

Plaintiffs object as being irrelevant and incompetent.

A. The onliest thing I could tell you how I know it was when my mother told me I was.
Q. 8. Go Devil, where were you on the morning of the 17th day of November, 1910?
A. In Covington.
Q. 9. What were you doing?
A. Why, I stayed in Covington; I come up on the train to come here and got here.
Q. 10. How did you go to get up into the train to come here?
A. I went to Sixth Street and went up Pike.
Q. 11. I mean how did you happen to come up here?
A. I came for Mr. Ireland.
Q. 12. At whose request?
A. Mr. Ireland's.
189 Q. 13. Whose employ were you in?
A. Mr. Ireland's.
Q. 14. How long had you been in his employ?
A. I went to work on the 16th; he hired me on the 16th, in the evening.
Q. 15. Were you in his employment before the 16th day of November, 1910?
A. No sir.
Q. 16. In whose were you working then?
A. Br. Brown Hastings.
Q. 17. How long had you been working for him?
A. Only a week.
Q. 18. Had you ever worked for Mr. Ireland previous to the 16th day of November, 1910?
A. Previous?
Q. 19. Before?
A. No sir, I hadn't been working for him before only that afternoon.
Q. 20. You had not been working for him before that?
A. No sir.
Q. 21. At no time?
A. No sir.
Q. 22. Had you known him before that?
A. Yes sir.

Q. 23. But was never in his employment previous to the 16th of November, 1910?

A. No sir.

Q. 24. Who came up here with you?

A. Chester Frakes.

Q. 25. Did you take any drink down in Covington before you started up here?

A. No sir.

190 Q. 26. Didn't take a glass of beer down there?

A. No sir.

Q. 27. Do you recall giving a statement to a gentleman some time in December last?

A. Yes sir.

Q. 28. Didn't you tell that gentleman, Mr. Bee Veenaman, that you took a glass of beer?

A. No sir, I didn't.

Q. 29. You didn't make any such statements to him?

A. Not about any glass of beer in Covington.

Q. 30. You came straight up to Lexington on the cars that day?

A. Yes sir.

Q. 31. Where did you go when you got here?

A. I got off the train and went out by Mr. Mahoney's.

Q. 32. Out by Mr. Mahoney's?

A. Out to Mr. Mahoney's.

Q. 33. What did you do there?

A. We taken a drink.

Q. 34. What did you do there?

A. I drunk a brandy.

Q. 35. Who have you been talking to about this case since yesterday afternoon?

A. No one but Mr. Franklin.

Q. 36. You have talked to Mr. Franklin?

A. Yes sir.

Q. 37. When did you talk with him?

A. Right after it happened.

Q. 38. I mean since yesterday afternoon.

A. After the Court adjourned.

Q. 39. Where did you talk with Mr. Franklin?

A. At the hotel.

191 Q. 40. When?

A. Yesterday afternoon.

Q. 41. What time?

A. About a quarter after five.

Q. 42. Whereabouts?

A. Phœnix Hotel.

Q. 43. Whereabouts?

A. I couldn't tell you exactly, because I don't know that much about the Phœnix Hotel.

Q. 44. Was it in a private room or down in the lobby?

A. I suppose it was in his room.

Q. 45. Did he tell you what had been testified in the case?
A. No sir.
Q. 46. Did he tell you what Frakes had said?
A. No sir.
Q. 47. Did he tell you Frakes said he took a drink at Mahoney's?
A. No sir.
Q. 48. What did you and he talk about in this case then?
A. He was just telling me not to make any mistake; he said tell the truth; he said "I can not plead any case if you are going to tell me a lie."
Q. 49. That is all he told you up there, to tell the truth and said, "I can't plead any case if you tell a lie about it?
A. Yes sir.
Q. 50. And you said you would?
A. Yes sir.
Q. 51. And that was all that was said between you and Mr. Franklin?
A. Yes sir.
Q. 52. How long were you in his room?
A. About five minutes.
Q. 53. Who else was up there at the time?
192 A. If there was any one else, I didn't see him.
Q. 54. And you haven't talked with anybody else since Court adjourned, except to Mr. Frankfort in his room?
A. No one.
Q. 55. And he said to you to tell the truth that he couldn't plead any case if you were going to tell a lie?
A. Yes sir.
Q. 56. What made him think you were not going to tell the truth?

Plaintiffs object, which objection is sustained by the Court, to this ruling of the Court defendant excepts.

Q. 57. What time did you go to Mahoney's that day?
A. About five minutes after twelve.
Q. 58. How do you recall that?
A. The reason I recall it, we got here at half past eleven and it takes quite a little while to walk from down town there.
Q. 59. What train did you come on?
A. C. & O.
Q. 60. From Latonia?
A. No sir, it was the L. & N.
Q. 61. Where did you take the train there?
A. Between Eighth Street and Pike in Covington.
Q. 62. Who was with you when you went to Mahoney's?
A. Chester.
Q. 63. Where did you get your dinner?
A. At Miss Annie Hightower's.
Q. 64. Ain't it a fact that before you went out to get your dinners that you stopped at Ida Wilson's on Deweese Street?
A. No sir.

Q. 65. Do you know her?
A. Yes sir.
193 Q. 66. How long have you known her?
A. About two years I guess.
Q. 67. You didn't stop there and didn't get your dinner there?
A. Didn't stop there and didn't get dinner there.
Q. 68. Ain't it a fact that you not only stopped there, but got several drinks there?
A. No sir.
Q. 69. Ain't it a fact that some of those drinks were gotten out of the bar room at Ida Wilson's place?
A. No sir, I ain't been in Ida Wilson's place that day.
Q. 70. After you got your dinner, didn't you go back in there?
A. No sir.
Q. 71. Didn't you take a number of drinks there?
A. No sir.
Q. 72. Didn't you see a woman by the name of Mamie Kelly?
A. No sir, when I got off the train at Main Street she was coming around by the Post Office.
Q. 73. Didn't you see her out at Ida Wilson's that morning before you went to get your dinner and after dinner?
A. No sir, I didn't have to go that way; I went up through the Bottom and up Vertner Avenue to Race.
Q. 74. Did you see her any more that day?
A. Yes sir, that evening.
Q. 75. Whereabouts?
A. On Deweese Street.
Q. 76. What time?
A. I don't know what time; I know it was in the afternoon.
Q. 77. On Dewees Street, whereabouts on Dewees Street?
A. Between Constitution and Third.
Q. 78. Where was Ida Wilson's house then?
194 A. Between Constitution and Third.
Q. 79. And it was there you saw Mamie Kelly?
A. I didn't see her at Ida Wilson's; I seen her on the Street.
Q. 80. How did you happen to be there at Ida Wilson's that time of day?
A. I had done come from dinner and come up that way.
Q. 81. Where were you going?
A. To town.
Q. 82. Whereabouts in town?
A. Down on Water Street.
Q. 83. Do you know where you did go?
A. Yes sir.
Q. 84. Where?
A. Miss Mattie —— was running a restaurant, and I went over to see her, I used to board with her.
Q. 85. How long did you stay there?
A. About ten minutes.
Q. 86. Where did you go then?

A. Back to the track.
Q. 87. Where did you go?
A. Miss Mattie ——.
Q. 88. A colored lady?
A. Yes sir.
Q. 89. Keeps a restaurant?
A. She wasn't keeping a restaurant at the present time; she had been.
Q. 90. Where is Mattie?
A. I don't know.
Q. 91. After you went down and paid your respects to Miss Mattie, where did you go?
A. Back to the track.
Q. 92. Whereabouts?
195 A. Around there towards Miss Annie Hightower's.
Q. 93. Where did you go when you went back there?
A. I went as far as the track goes.
Q. 94. What did you do then?
A. I stood there a while talking to the boys.
Q. 95. Who did you talk to?
A. I don't know; so many there.
Q. 96. Give the names of some of them?
A. I couldn't give you the names, so many.
Q. 97. Can't you recall who they were?
A. No, sir.
Q. 98. How many were there?
A. About six or seven.
Q. 99. And of this six or seven boys you met there, you can't give a name, not one of them?
A. No, sir.
Q. 100. What became of you when you left there?
A. I went down Fourth Street to see my little boy.
Q. 101. Whose house?
A. Mr. Tan Gibsons, that is where my baby is at.
Q. 102. What is the number of that place?
A. I don't know, sir.
Q. 103. Are they at the same place now?
A. Yes, sir.
Q. 104. What is the man's name?
A. Mr. Tan Gibsons.
Q. 105. What does he do?
A. He works here in the Court House.
196 Q. 106. What time was it when you got to see your boy?
A. About half past three.
Q. 107. How long did you stay there?
A. About an hour.
Q. 108. Where did you go then?
A. Back to the track.
Q. 109. Where did you go at the track?
A. To Mr. Gaines' stable.
Q. 110. What is Gaines' first name?

A. Bob Gaines.
Q. 111. Colored man?
A. Yes, sir.
Q. 112. What time did you get to Bob Gaines' stable?
A. I guess about half past four.
Q. 113. I don't want any guessing.
A. You know a person ain't got any watch can't state exactly.
Q. 114. Tell about the time?
A. I said about half past four.
Q. 115. Then what did you do?
A. Stayed at the stable a while and walked back to the gate.
Q. 116. How long did you stay at the stable?
A. I don't know how long.
Q. 117. Only your opinion as to how long you stayed there?
A. About three-quarters of an hour.
Q. 118. What time was it that you went away from the stable?
A. I don't know what time it was when I left the stable.
197 Q. 119. You knew exactly the minute, a while ago, when you left and went on the car here,—can't you recall what time it was when you left the stable?
A. Because I don't know what time it was.
Q. 120. Where did you go when you left the stable?
A. I walked out to the gate.
Q. 121. Whom did you see there?
A. Met Chester at the gate.
Q. 122. Who else was there?
A. No one else.
Q. 123. Where did you go then?
A. Back to the stable—Mr. Bob Gaines's stable.
Q. 124. How long did you stay there?
A. I didn't stay there very long before we loaded.
Q. 125. How long did you stay, about?
A. About I suppose an hour.
Q. 126. Then what time did you leave?
A. I guess I left there about six o'clock.
Q. 127. You left there about six o'clock, how near six was it?
A. I couldn't say, because I don't know.
Q. 128. Where did you go?
A. We taken the horses to the shoot.
Q. 129. You went from Gaines' where to get the horses?
A. The horses were at Mr. Bob Gaines' stable on the track.
Q. 130. You know when it was you left there?
A. Yes, sir.
198 Q. 131. What time was it when you started from that stable?
A. I thought you meant the day of the month, or anything like that.
Q. 132. Did I say anything about the month; I asked you what time it was that day when you started from that stable?
A. I couldn't tell you exactly.
Q. 133. Where did you go?
A. To the shoot.

Q. 134. What time was it when you got to the shoot?
A. I don't know; I know about the time it was when we got them loaded.
Q. 135. What time was it when you got to the shoot?
A. I couldn't tell you.
Q. 136. How long were you loading?
A. I don't know that neither.
Q. 137. What time was it then, when you got through loading?
A. About a quarter of seven.
Q. 138. How do you recall that time, and didn't remember any of the other times?
A. The other time is what I really don't know.
Q. 139. How do you come to recall the time you got through loading?
A. Because I told you once before I know when we got through loading.
Q. 140. How do you know it?
A. Mr. Bob Gaines told me from his watch.
Q. 141. When did he tell you?
A. Before we left there.
Q. 142. How did he come to tell you?
A. Because I asked him.
Q. 143. Why did you ask him what time it was?
A. Because I wanted to know the time we would leave the shoot.
199 Q. 144. Did he tell you what time you all left?
A. He said he didn't know what time and I guess he did not,—guess he didn't.
Q. 145. Did he say you left there about a quarter of seven?
A. He said the horses were loaded about a quarter of seven.
Q. 146. How long did you stay there after loading?
A. About a quarter of an hour.
Q. 147. What time did you leave the shoot?
A. After the horses were loaded—well I suppose about a quarter of eight.
Q. 148. Then w-ere did you go?
A. Pulled us down in the yard.
Q. 149. Who was there with you?
A. Chester Frakes.
Q. 150. What time did you get down in the yard?
A. Five minutes after eight.
Q. 151. How did you come to recall it was five minutes after eight?
A. I seen the clock from the railroad down there.
Q. 152. Did you look especially to see what time it was?
A. Yes, sir.
Q. 153. What was your object in seeing what time it was?
A. Because they said the train left here about nine o'clock.
Q. 154. Where did you go after the car got down in the yard?
A. No place.
Q. 155. Where did you stay?
A. Stayed in the car.

Q. 156. Who else was in there with you?
A. Chester was with me; he got down out of the car.
Q. 157. Do you know where he went?
A. No, sir.
200 Q. 158. How long was he gone?
A. O, it wasn't twenty minutes.
Q. 159. About what time was it when he got back there?
A. That would make it twenty or twenty-five minutes after eight.
Q. 160. Did he leave the car after you got there?
A. Yes, sir; the engine had done cut loose, and he said, "I am going to walk up the street."
Q. 161. Now after you got down there, how long before it was cut loose from the engine?
A. Right away.
Q. 162. Do you recall what time it was then—about you say fifteen or twenty minutes after eight that Chester got back?
A. Yes, sir.
Q. 163. Where did you boys stay after that?
A. I stayed in the car.
Q. 164. Where did he stay?
A. He got out and went back up the street.
Q. 165. Tell you when he got back?
A. He stayed in the car.
Q. 166. When did that car pull out from there?
A. At ten or fifteen minutes after nine.
Q. 167. What became of Chester?
A. He was in the car
Q. 168. What became of him?
A. In the back end towards Lexington; I was in the front end going towards Louisville.
Q. 169. Were those lanterns then lighted?
A. Yes, sir.
Q. 170. Tell us again how the lanterns were put up?
A. We wired—there was ten penny nails driven in the car and bent.
201 Q. 171. What sort of lantern did you have there?
A. Didn't have any like that (pointing to one on the table), it was a larger and better lantern.
Q. 172. What sort of lantern did you have?
A. We had a lantern much larger than that the other lantern was a dollar lantern and those are 50 cts. lanterns.
Q. 173. That wasn't the lantern you had?
A. No, sir.
Q. 174. How do you know this is a fifty cent lantern; this one only cost forty cents.
A. Well, they change the prices on everything you know.
Q. 175. You bought that lantern at Mahoney's didn't you?
A. Yes, sir.
Q. 176. Now how was that lantern put up there?
A. Put up in the center of the car in between the sides a wire nail driven and the handle was put over it and bent over it and ten penny

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nails caught the wires that run from the frame of the lantern and another went around that way and another one this way; tied four ways; there wasn't any chance of having it shake at all.

Q. 177. Wasn't there what you call a guy wire, so that they would be crossed that way, one pulling that way?

A. Pulling.

Q. 178. Whatever you call it, raising the wires and clinching it in that position?

A. Yes, sir; it was tied four ways.

Q. 179. Did you see the nail driven in there?

A. Yes, sir.

Q. 180. What was the nail driven into?

A. In the joists of the car.

Q. 181. It wasn't driven in the side of the car?

A. No, sir.

202 Q. 182. You are perfectly positive in saying it was not driven in the side?

A. Yes, sir.

Q. 183. You said something about a little board hanging down there didn't you?

A. Yes, sir.

Q. 184. Where did it hang?

A. Top of the car rested on it; it run crossways.

Q. 185. What did you say about that board?

A. No more than the nail was driven in it.

Q. 186. The nail was driven in that part?

A. Yes, sir.

Q. 187. Where was that nail driven with reference to the center aisle you speak of?

A. Right straight up over the middle aisle.

Q. 188. Which way was the nail driven?

A. The nail driven straight in and then bent over on the inside of that board.

Q. 189. How many nails were driven through?

A. Only one.

Q. 190. What was attached to it?

A. Nothing attached to it; the nail was driven in and went over the handle.

Q. 191. But the lantern was hung by the handle to that nail?

A. Yes, sir.

Q. 192. What was the next thing that was done?

A. That was the first thing that was done.

Q. 193. Who did that?

A. Mr. Bob Gaines and Chester.

Q. 194. Were you present when they did it?

A. Yes, sir.

Q. 195. Was your lantern driven that way?

A. Both of them were driven that way.

203 Q. 196. Take one at a time—when you drove that nail and the handle put over it, then what did you do?

A. Then what did I do?

Q. 197. Yes.

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A. The nail was bent over, and I think it was tied with wire.
Q. 198. Was it tied with wire?
A. It was tied four ways.
Q. 199. Tell me one of them, how it was tied,—take this lantern and show how it was tied?
A. Here is part of this lantern in the aisle, there is the nail driven in here, and it is bent over like this; and then a wire tied over here; it goes across that way and one this way and one that way; then tied four ways.
Q. 200. How are the wires attached?
A. Tied right around here.
Q. 201. Then there were not any wires tied to the top of the frame at all?
A. No, sir.
Q. 202. You are perfectly certain of that?
A. Yes, sir.
Q. 203. Was it wrapped around here?
A. Yes, sir, wrapped around here.
Q. 204. Put in here and then wrapped around it?
A. Yes, sir, and went in one on that side and one on that side and on the other side.
Q. 205. Then these wires didn't cross at all?
A. How do you mean?
Q. 206. One wire went this way and the other that way, and the other this and that way?
A. Yes, sir.
Q. 207. What were the ends of this wire attached to?
A. Some of them attached to the frame that the window
204 is to and some of them—well each side window, you see on the other side there was a nail driven in to attach to it.
Q. 208. I don't think that I quite understand you—let us take the right hand side of the car, how did you attach the wires that were attached to the right hand side of the car, were they attached to the car by what means?
A. You know where there is horses standing at there is a window, there is iron rods up over and there is also a ring up there to tie them up to.
Q. 209. O, yes, then there wasn't any nail there to tie it to at all?
A. On one side door.
Q. 210. On which side?
A. On the right hand side as you go towards Louisville.
Q. 211. I thought I was just asking you about the right hand side and you said there was a ring there?
A. There is on one side; and on the other, one runs up over the door.
Q. 212. Let us take the window side first,—how did you attach the wires to that side?
A. I tied it to the ring.
Q. 213. There were not any nails driven there at all were there, on the right side?
A. On the right side?
Q. 214. Yes?

A. Yes, sir, one nail driven on the right side, but not the one I tied the ring to.

Q. 215. Why did you just use the ring to one of the wires and not the other?

A. Because the lantern would swing.

Q. 216. Did you notice which side of the window you fastened it to, the window on the right hand side,—which side of the window the right or left was the nail driven on?

205 A. On the right side.

Q. 217. Did you see that done?

A. Yes sir.

Q. 218. How about the wires that went across on the left side of the car?

A. One of them here.

Q. 219. Not to the window?

A. No, sir.

Q. 220. How was the other attached?

A. The other one in the same way.

Q. 221. When you got to Chester's window was that done in the same way?

A. Yes sir.

Q. 222. Then you don't use all nails at all?

A. No sir wasn't all nails used.

Q. 223. About what time did your car start from Lexington?

A. Ten minutes after nine.

Q. 224. What time did you get to Frankfort?

A. I couldn't say what time we got there but I can tell you what time we got to the livery stable.

Q. 225. What became of Chester during the time that the car was going from here to Frankfort?

A. I suppose he went to sleep.

Q. 226. Not what you suppose, I want what you know.

A. That is something I don't know; he was in the other end of the car.

Q. 227. Did you see where Chester was when the light went out on your lantern?

A. No sir, I didn't see where he was.

Q. 228. Do you know where he was?

A. Yes sir, I knowed where he was at.

206 Q. 229. Was it dark in there?

A. No sir, it was light.

Q. 230. I thought you said the lights were both put out?

A. They were but my back was turned to him to light my lantern and then I saw the blaze.

Q. 231. Did you light your lantern?

A. No sir, I didn't get to light it.

Q. 232. Where was the blaze when you first saw it?

A. I saw it through the panels of the aisle door.

Q. 233. Put your finger on the door on that diagram.

A. There is a door right here.

Q. 234. Where were you?

A. I were in this end.

Q. 235. And whereabouts in that aisle?
A. Right along here.
Q. 236. Up towards,—more to the south of it?
A. Yes sir.
Q. 237. Will you explain to the jury how it was when you were up there—where was the fire?
A. In the main end towards Louisville.
Q. 238. Whereabouts in the front end?
A. I couldn't tell exactly, I seen the lights through the slats of these bars.
Q. 239. You couldn't tell where the fire was?
A. I knew it was in the end of the car.
Q. 240. Did you go back to see it?
A. No sir. I was lucky to get out without going back to see it.
Q. 241. Didn't go in there because there was too much heat in there?
207 A. Yes, it was hot at the end I was.
Q. 242. Then the fire had been in progress before you saw it, if there was too much heat for you to go back?
A. I couldn't say how long it had been burning.
Q. 243. Pretty big fire?
A. Yes sir.
Q. 244. You were awake?
A. I set on the sack by this door.
Q. 245. And awake?
A. Yes sir.
Q. 246. And when you first saw it, it was so hot you did not want to go in?
A. I didn't see it when the train bumped; it knocked me off, right under this horse, right here.
Q. 247. And then you got up?
A. To light my lantern.
A. 248. How long between the time the train bumped and you saw this light?
A. I seen it right here; I didn't see it until Chester hollered to me to let him out there.
Q. 249. Who fastened that door?
A. I did; the fastening was on my side.
Q. 250. And then what did you and he do?
A. After I let him out I opened the other door and we jumped out and commenced hollering to the train to stop.
Q. 251. Which door did you open?
A. It was on the right hand side, Lexington end of the car.
Q. 252. Where did you go out?
A. The same door.
Q. 253. When you got out there, had you heard any hollering before you got up?
A. I heard somebody holler, but I didn't know who it was.
208 Q. 254. What did they holler?
A. Hey! like that; some brakeman hollered on the railroad.
Q. 255. Did they holler more than once?

A. I didn't hear it more than once.
Q. 256. What did you think they meant?
A. I couldn't tell you what it meant.
Q. 257. Did you hear anybody holler hello, to get out of that car?
A. No, didn't anybody hello.
Q. 258. You would have heard it if they had?
A. Yes sir.
Q. 259. And then you and Chester got out of this door?
A. Yes sir.
Q. 260. Did you make any attempt to put out the fire before you got out of there?
A. He might have.
Q. 261. Did you?
A. No sir.
Q. 262. Did you see him make any attempt to put the fire out?
A. No sir.
Q. 263. And then when you got out, whom did you see, did you see any people outside then?
A. Not until we hollered and jumped out.
Q. 264. And when you got out did you see anybody?
A. No sir.
Q. 265. When was the first time and how long were you getting out before you saw anybody?
A. About two or three seconds.
Q. 266. Wasn't there a bright light out there?
A. Yes sir, the light shone through the windows.
Q. 267. How was the light; had there been a moon shining, or was there snow on the ground?
209 A. No sir, it was a deep frost, though.
Q. 268. Was it so you could see a person the length of the car?
A. No sir.
Q. 269. How was the weather?
A. It was cold.
Q. 270. Much cold?
A. Yes sir, pretty cold.
Q. 271. Do you know what time of day or night that was?
A. No sir, I don't.
Q. 272. Now what did you and Chester do just as soon as you got out of that car?
A. From the time I left the car door I commenced hollering and the train stopped as soon as we got out; this fellow jumped out and asked me what was the matter.
Q. 273. Was the train moving, when it threw you off that sack?
A. Yes, it was moving; looked like it just bumped a fellow right straight out.
Q. 274. And then you jumped up as soon as you could?
A. Yes, to light my lantern.
Q. 275. And then you saw the light?
A. I didn't until he hollered for me.
Q. 276. Right away then?
A. Yes sir.

Q. 277. And then there was a big blaze?
A. Yes sir, large blaze.
Q. 278. And then you saw—now how many?
A. About three.
Q. 279. Where did they come from?
A. Two of them were brakemen.
Q. 280. Who was the other?
210 A. I don't know.
Q. 281. What did they say to you; what was the conversation between you and any one of those men there?
A. There was no conversation at all.
Q. 282. Didn't you state to Mr. Franklin what took place between you?
A. Yes sir.
Q. 283. What was it?
A. They asked me what is the matter up there and I said the car is on fire, and he said I guess you have been smoking cigarettes up there, and I told them no sir, to let us the get the horses out. He said "What in the hell are you going to do", and I said, "Get the horses out of here, are you going to stay here and let them burn up".
Q. 284. Where was he standing?
A. He was standing in the front end, where the fire was.
Q. 285. And what did you mean by standing in here?
A. I said, "Are you going to stand here and let them burn up?"
Q. 286. Who was the conductor or brakeman?
A. I couldn't say.
Q. 287. Then what did you do?
A. Taken the door down and taken the horses out.
Q. 288. Did you see anybody using a coal pick to try to get the door open?
A. After that we couldn't get in there for the smoke to get the horses out.
Q. 289. Which one of the doors?
A. The one towards the Louisville end.
Q. 290. And that didn't occur until the horses were all out?
A. The other horses were all out.
Q. 291. Who took them out?
211 A. Me and Chester.
Q. 292. Did anybody else?
A. Nobody else.
Q. 293. You are perfectly sure of that?
A. No sir.
Q. 294. Is it not a fact that you all were out of the car and the conductor got up there to help get them out of there?
A. No sir.
Q. 295. Did they get in the car and had pulled Chester out?
A. No sir.
Q. 296. That is not so?
A. Not so.
Q. 297. Where did you see the piece of broken lantern?
A. Under this car, right here.

Q. 298. Have you been talking with Chester since he testified in this case?
A. No sir.
Q. 299. Who have you been talking to beside Mr. Franklin?
A. No one on earth.
Q. 300. You have not seen Chester since?
A. I saw him this morning.
Q. 301. Then talked to him?
A. No sir.
Q. 302. Did all the horses get out at once?
A. No sir; didn't none of those get out at all, they couldn't get out.
Q. 303. What did you do with those horses?
A. Jumped them all out.
Q. 304. I asked you what you did with the horses after they were out of the car?
A. Taken them to the livery stable.
Q. 305. Who took them?
212 A. A brakeman a young fellow and myself and Chester.
Q. 306. Where was the car standing—do you know where the end of the bridge is down there?
A. Yes sir.
Q. 307. Which way with reference to the end of the bridge was the car standing when the horses got out of that car?
A. End of the bridge that goes towards Louisville.
Q. 308. How far was it from the end of the bridge?
A. I suppose about three-eighths of a mile.
Q. 309. What did you do with those horses?
A. We walked them over the bridge and taken them to the livery stable.
Q. 310. Who were with you?
A. The brakeman was in front to show us the way to the livery stable, and Chester was leading the horses and I was leading the horses, and another fellow, I don't know who he was.
Q. 311. Was he a railroad man?
A. I think he was.
Q. 312. You did not see anybody along there at all?
A. No sir, not until I met the policeman.
Q. 313. How far from the end of the bridge up to the depot there did you meet the policeman?
A. Coming right across the street that goes up to the Capital Hotel.
Q. 314. The first time you saw the policeman he was there?
A. Yes sir.
Q. 315. Just right in where the depot is?
A. Yes sir.
Q. 316. And the first time you saw the policeman what was he doing, standing or what?
A. He was walking up that way; he said he heard a loud noise up there.
213 Q. 317. Never mind what he said—you saw him first at the corner of Ann Street, which is a street just west of the depot—do you know where the depot is?

A. Yes sir.

Q. 318. Now that street that is west of that, towards the bridge, was where you saw him?

A. Towards the bridge?

Q. 319. Yes.

A. Yes.

Q. 320. Which way was he going?

A. He was going down here the way we were going.

Q. 321. Had he got across Ann Street, or was he on the side next to the depot?

A. He had crossed Ann.

Q. 322. How far from the corner?

A. I won't say, because I don't know how far he was from the end of the Street.

Q. 323. How many horses did you have then?

A. I had six.

Q. 324. The policeman said he had heard some hollering down there and he was going down there to see—what did he say?

A. The policeman said he heard a noise down there and he wanted to find out what it was.

Q. 325. And was going down there to find out what it was?

A. Yes sir.

Q. 326. You took those horses to the livery stable?

A. Yes sir.

Q. 327. Do you recall when it was that Dr. Shannon got there?

A. No sir, not exactly; I don't know what time it was when he got there.

Q. 328. What was done with those horses the next day?

A. There was nothing done with them, only being doctored I think.

214 Q. 329. Stayed in the livery stable?

A. Yes sir.

Q. 330. How long did they stay in there, in that livery stable?

A. Altogether, I suppose four or five days.

Q. 331. Then what became of them?

A. Shipped to Lexington.

Q. 332. And then where were they taken?

A. To the race track.

Q. 333. How long did they stay there, do you know?

A. No sir, I don't know.

Q. 334. What was done with them at the race track?

A. Nothing but walked, taken care of and fed.

Q. 335. Do you know what became of those horses that were brought back here afterwards?

A. Yes sir, after they was here a while, we went to Mexico.

Q. 336. How long was that?

A. I don't know exactly how long it was.

Q. 337. You know when you left for Mexico?

A. Left for Mexico, I don't know.

Q. 338. What month?

A. They left in December.

Q. 339. What part of the month?

A. I suppose about the 3rd or 4th.
Q. 340. When did you reach Juarez?
A. When did we reach Juarez,—I think the 8th or 9th, along there somewhere.
Q. 341. What was done with the horses after you got to Mexico?
A. We walked them a while; well we walked some of them while some were jogged.
Q. 342. How long after getting to Mexico, before you began to jog them?
A. About five days.
215 Q. 343. Did you breeze any of them down there?
A. Yes sir.
Q. 344. How long after getting to Mexico before you began to breeze them?
A. I don't know, because I wasn't training them; I could not tell you that.
Q. 345. Did any of those horses run in any race?
A. Well, there is the Jack Wainwright and the Miller filly and the first Star Shoot colts.
Q. 346. Three of them?
A. Yes sir.
Q. 347. The first Star Shoot colt was the Amy Davenport colt?
A. Yes sir.
Q. 348. What was the Miller?
A. The other one was by Ethelbert.
Q. 349. They called her Ethel Wicks, didn't they?
A. Yes sir.
Q. 350. And what was the Jack Point colt?
A. Jack Wainwright.
Q. 351. All three of them running down there?
A. Yes sir; I think Ethel Wicks run four times and the other colt four times; Jack Wainwright started four or five times.
Q. 252. Do you recall how Jack came out there?
A. He run four or five times; he finished second and third.
Q. 535. How many horses would be in the race, in which he ran second, how many entries were there?
216 A. I don't know sir.
Q. 354. Was there more than him and another horse?
A. Yes sir.
Q. 355. About how many?
A. I can't say how many more, because I don't know.
Q. 356. Have you any idea how many?
A. No sir.
Q. 357. Do you recall stating to Mr. Veenaman, the man we were talking about a while ago that took your statement, that when the bumping happened, there was only one car attached to the engine—do you remember making such a statement as that to Mr. Veenaman, when he took your statement about the 31st, in Leington, Ky.?
A. I told him, yes sir, that there was only one car to the engine, one car.
Q. 358. That was all?
A. That was all.

Q. 359. Had the train started out for Louisville when the accident happened?
A. No sir.
Q. 360. You are perfectly certain of that?
A. Yes sir, I am perfectly certain of that.
Q. 361. The train had not started out towards Louisville?
A. No sir, not the whole train; only that car and the engine.
Q. 362. How did you know that, Go Devil?
A. Because I seen it.
Q. 363. I thought you were inside of the car?
A. Well, after I jumped out I seen it.
217 Q. 364. Was there no cars near that at all?
A. They might have been near it, but there was none on to it.
Q. 365. When you got out?
A. When we got out.
Q. 366. Where was the other cars of the train?
A. They had just made up, I suppose.
Q. 367. Not what you suppose?
A. I think.
Q. 368. But there was only one car attached to that engine, and it was moving in the direction of Louisville when this happened?
A. Yes sir, it was moving in the direction of Louisville.
Q. 369. The car and the engine of which you speak, when the accident happened, was moving in the direction of Louisville?
A. Yes, sir.
Q. 370. How long had it been moving in that direction?
A. Hadn't more than hit it together, looked like it just started off.
Q. 371. You say when you got out of there—how long after that bumping before you got out of the car?
A. I tried to light my lantern and couldn't get it lit and this boy hollered and we both jumped out.
Q. 372. How long was it after the bumping before you got out?
A. It couldn't have been more than three or four minutes
Q. 373. There was only that car?
A. That is all.
Q. 374. And no more?
A. No more.
Q. 375. Was it as long as three or four minutes?
A. Yes sir, as long as three or four minutes.
Q. 376. Do you know Ida Wilson?
A. Yes sir.
218 Q. 377. And do you know Mamie Kelly?
A. Yes sir.
Q. 378. Do you recall when you got back to Lexington—when did you come back to Lexington?
A. From where?
Q. 379. From Frankfort?
A. No sir, I don't.
Q. 380. How long, about?
A. I come back that evening, the following evening.

Q. 381. The evening of the 18th?
A. Yes sir.
Q. 382. Do you recall seeing Ida Wilson and Mamie Kelly on the evening of the 18th, or within a day or two after the accident, and having a conversation with those two women?
A. No sir.
Q. 383. And that each of them, and that you said to them that you had a hard time getting Frakes out of there, and you were afraid he was going to burn up?
A. No sir.
Q. 384. You never made any such statement?
A. No sir.
Q. 385. Here in the city of Lexington?
A. No sir.
Q. 386. Or no other place?
A. No sir.
Q. 387. Neither at Ida Wilson's house or any other place?
A. I hadn't been in Ida Wilson's place at the time.
Q. 388. Did you or not make such a statement, in substance, to either of those women, at Ida Wilson's house, or any other place, in the city of Lexington, within two or three days after the accident happened?
A. No sir.

219 GAINES, ROBERT (Col.), who having been first duly sworn testified on behalf of the plaintiffs:
Q. 1. Where do you live?
A. At Mr. Catesby Woodford's.
Q. 2. Do you mean you live on Mr. Catesby Woodford's farm?
A. I live near Paris, and work at Mr. Catesby Woodford's.
Q. 3. How long have you been employed with race horses?
A. About twenty-five or thirty years.
Q. 4. In what capacity have you been employed with race horses, what sort of work have you been doing with race horses?
A. Been taking care of them, training, rubbing, breaking,—every thing that was to be done about horses.
Q. 5. How long have you worked for Mr. Woodford?
A. Going on two years; beginning March 20, 1910.
Q. 6. Did you know a Star Shoot colt that belonged to Woodford and Ireland?
A. Yes sir.
Q. 7. When did you first become acquainted with that colt?
A. When I went to the farm we taken them up as a weanling and put him in the stable and began to handle him; I halter broke him, on up to the time we shipped him.
Q. 8. Did you know the Blue Danube?
A. Yes sir.
Q. 9. How long had you known him?
A. Some time before we taken them away.
Q. 10. Did you know the Miller colt that belonged to the same parties?

A. Yes sir.
Q. 11. How long had you known it?
A. The same time, from the time they were weaned.
Q. 12. Did you know the Miller, Lady Premier filly?
220 A. Yes sir.
Q. 13. How long had you known that?
A. Weaned her at the same time, and then I handled her at the track.
Q. 14. Did you know the Ethelbert, Miss Wicks filly, which belonged to the same parties?
A. Yes sir.
Q. 15. How long had you known that one?
A. Same time, all of them the same time.
Q. 16. Did you know the Jack Point, Lady Vincent filly?
A. Yes sir.
Q. 17. How long had you known that one?
A. The same time.
Q. 18. Did you know the Star Shoot, Amy Davenport colt?
A. Yes sir.
Q. 19. How long had you known that one?
A. The same thing.
Q. 20. Who halter broke that colt?
A. I don't remember.
Q. 21. Before the 17th day of November, 1910, what was the disposition of those horses?
A. The finest you ever saw; there wasn't a mean disposition in the bunch. I must say it was strange how you couldn't find in no one; just as fine as a quiet disposition man. You could do anything with them; halter break them; work them; they worked as nice as any breaking colt a man ever seen, don't care where they come from or whose they is.
Q. 22. Did you handle any of them after they were broken or work with them?
A. Yes sir, I had six at the track; I had a boy that clipped them and I brought them up and worked them over the Lexington track.
221 Q. 23. Which were they?
A. The Amy Davenport colt, the Jack Point colt, the Lady Vincent colt and the two Millers and Ethelbert filly. I had five in my charge, one of them was a two-year old, Marsand. These five I suppose all were yearlings; the Amy Davenport, Jack Point, two Millers and the Ethelbert.
Q. 24. The Star Shoot, did you work with them?
A. Yes, I didn't train them; Mr. Lewis trained the two Star Shoots, and I worked with them in the young form; I halter broke them, but I didn't train the two Star Shoots; I only trained the Amy Davenport by Star Shoot.
Q. 25. Were they at any time loaded to be shipped away from Lexington on the car?
A. About the 17th of November, 1910, was when we loaded them.
Q. 26. Who was present at the time they were loaded?

A. Mr. Will Lewis and Chester Frakes and a man by the name of Go Devil and myself. Mr. Ireland was there part of the time, but I don't think he was there when we had finished loading them. I know he was when we commenced loading.

Q. 27. Do you remember what time the car was placed there for these colts to be loaded?

A. Right about half past five o'clock, it couldn't have been much earlier than that, because it was behind time at that; we were waiting for it quite a while before the car was backed into the shoot.

Q. 28. How was that car arranged for the loading of these colts?

A. In what way?

Q. 29. Was there any bedding in the stalls?

A. Yes, sir.

Q. 30. How many stalls were bedded in the car?

A. Eight.

222 Q. 31. Suppose this to be the car, showing the stalls and the partition running across the middle of the car, with a door in the partition, do you remember the particular stalls in which the different horses were put?

A. No, sir, I couldn't say; I can just call but two.

Q. 32. Which two were they?

A. The two Star Shoots; I know they were standing to my right in the end that pointed to Louisville; I know they were there.

Q. 35. Now taking this square to represent a stall in the right hand Louisville end of the car (referring to diagram) and this square to represent the stall in the left hand end of the Louisville end of the car, this long narrow space across the car the aisle, between the two doors, one of which was on each side of that car, where were those two ho-ses put, if you recall?

A. The two Star Shoots?

Q. 34. Yes.

A. You see this is the door.

Q. 35. Yes, the car door?

A. Now, you go into the car here, there is a stall, and two Star Shoots and this end of the car pointing to Louisville, well this is the end of the car pointing to Louisville,—well the two Star Shoots were in this end, I know that. And on this end, I think the way they were loaded, was the two Miller fillies, standing across from the two Star Shoots, just opposite.

Q. 36. Where were the other horses put?

A. In this end here is your other car door and a back end was—well, the Ethelbert filly was standing here with her head that way, and here one of the Miller fillies; you see Marsand was standing so her head was back to the other Miller filly; while the Amy Davenport colt faces these two fillies and the door here.

223 Q. 37. How many of these horses rode backward and how many forward?

A. Well, there are four loaded backward and four forward, to put eight in the car, and there was eight in the car.

Q. 38. Who put the lanterns in the car?

A. I put one of them in like the other one way and Chester

Frakes put the other one in. We went in and looked at the one he put in, making me oversee both lanterns.

Q. 39. What experience had you in placing lanterns for the shipment of stock?

A. Well, I have had about twenty-five or thirty years in the business, and have been putting up lanterns and shipping horses for about twenty-five or thirty years.

Q. 40. With reference to the custom of placing lanterns, how were those lanterns placed in that car?

A. Well, I took this end of the car and I put the lantern up at this joist over here, you see, and then I took a ten penny nail and I drove through this rafter half way or more, then put the handle of the lantern on that nail you see, and then I took my hammer and drove that nail backwards this way to the rafter and clinched it, making a staple of the nail, and then I took a wire and tied the lantern down here to these frames four ways, with wire to this frame, I wrapped the wire around this and bind it and I wrap it here and bind it there, that makes four ways around the frame of the lantern, while it is fastened up so, and these wires runs back here to the wall of the car and here it goes to the posts of the partition on the wall, to which it is fastened up here with a screw at the top and a screw at the bottom. This partition between the horse's stall the wire is fastened there and clinched back and brought back and clinched back and here at this side clinched back, making four ways; and all the work was done with ten penny nails, I had
224 them at my barn and that was all I had, the nails was the best; I had always been used to working with nails, and always had very fair success with it.

Q. 41. Why are lanterns put in the car?

A. For the man to see where the horses are in, and if they have water and feed, to see if the horses had water and feed; without a lantern what would a man do, why he would have to open the door and run out.

Q. 42. Was that the custom among horsemen generally?

A. Yes, I never saw horses shipped with men, without a lantern.

Q. 43. Who did you say helped load these horses?

A. Chester Frakes and Go Devil.

Q. 44. Do you know what time the loading was completed?

A. Between seven and half past, right around there.

Q. 45. Do you know what time that car left the race tracks?

A. It left at right about eight o'clock; it couldn't have been any later than eight o'clock; it might have left a little earlier; it was due to leave at half past——

Q. 46. Were you there at that time?

A. Yes, I was there.

Q. 47. At the time the car pulled away?

A. No, sir, I wasn't there when the engine come after it; I left there about half past seven o'clock.

Q. 48. What was the condition of the lanterns in that car when you left there?

A. They were safe when I left; everything was safe.

Q. 49. What time were the lanterns lighted?

A. About half past six, or when it begun to get dark enough so they couldn't see, they had to light the lanterns to load by.

225 Q. 50. They were burning that night at the time you left?

A. Yes, they were burning, everything was going on very nicely, and I judge a man couldn't do any more to them; I had tightened mine and I asked Chester Frakes if his were safe, and he remarked to me——

Q. 51. Never mind any conversation—what besides lanterns and horses were put in the car?

A. Hay and oats.

Q. 52. Do you remember how much hay and oats?

A. Five bales of hay, a sack of oats at each end; three bales of hay in one end and two in the other to feed them on.

Q. 53. Did you see those horses again after that?

A. No, sir.

Q. 54. Well, at any time since then have you seen those horses?

A. No, sir, I haven't seen them since the fire, no sir.

Q. 55. Did you see those horses or any of them work at that track at all, breezed or handled?

A. Yes, sir.

Q. 56. Which of them?

A. Well, those of mine I breezed them; I never considered working them; they looked like they were going fast enough breezing them, and I really hadn't handled them and set them down, never set them down; they went fast enough, breezed them along.

Q. 57. How many horses were at the track at that time, do you know?

A. No, sir, I don't just quite know how many were there but quite a number of yearlings there.

Q. 58. What sort of showing did these horses make for the handling they had had?

A. I think they made as——

226 Defendant objects.

COURT: He may state what they did.

Q. 59. Well, state what they did?

A. I think they did first class——

Defendant objects, which objection is sustained by the Court.

Q. 60. What handling did they have out there?

A. Well, they only went at forty-two, this year at this track and I breezed the filly that got killed at one-eighth in twelve, the first time.

Q. 61. What filly was that?

A. The little Miller filly, we called her Lady Beth.

Q. 62. Who handled the others?

A. Mr. Lewis.

Q. 63. What Lewis?

A. Mr. Will Lewis; the two Star Shoots you speak of, I had six in my charge and the one I spoke of——

Q. 64. Which horses that were loaded in this car did Mr. Lewis have?

A. The two Star Shoots out of Last Cherry, and the Star Shoot out of Blue Danube.

Q. 65. And the others in this car you had charge of?

A. Yes, all the others.

Cross-examination:

Q. 1. In whose employment are you?

A. Mr. Catesby Woodford's.

Q. 2. How long have you been in his employment?

A. Right about two years, beginning March 20, 1910.

Q. 3. And altogether you say you have received horse experience in nearly every way about twenty-five or thirty years?

A. Yes, sir.

227 Q. 4. You knew these colts in question here, and had them from the time they were yearlings?

A. Yes, sir.

Q. 5. The ones which you handled and breezed were all of them, except the Last Cherry, Star Shoot and the Blue Danube?

A. Yes, sir.

Q. 6. Did you ever time any of those horses?

A. I never did time them myself, I had a man to time them; Mr. John Ireland——

Q. 7. You never timed them?

A. I got Mr. John Ireland to time them for me and Mr. Hayes.

Q. 8. You were out there when these respective colts and fillies were put in the car?

A. I was there.

Q. 9. At the track?

A. Yes, sir.

Q. 10. You examined the car before they were put in or not?

A. Yes, I examined the car and everything appeared all right.

Q. 11. All right—about what time were these colts taken there to be put on the car?

A. Right about five o'clock or half past, something along there.

Q. 12. How long were you loading?

A. Well, we finished about half past six, something along there, half past six or seven o'clock.

Q. 13. Now which was it?

A. Couldn't say it was right exactly seven, because I didn't look at my watch; I couldn't say it was just six o'clock. I would say if we commenced loading at five o'clock, and you would——

COURT: Never mind about all that.

Q. 14. Half past six or seven o'clock?

A. I was giving my reasons——

228 Q. 15. Half past six or seven o'clock,—about half past six or seven when the lanterns were lighted?

A. About half past six.

Q. 16. Now, Gaines I will ask you to explain to this jury the difference between the kind of lantern you used and this (pointing to the lantern on the table),—in order that the jury may understand it?

A. The lantern we used was a larger better lantern than that; that costs fifty cents.

Q. 17. Only forty.

A. I always gets them for fifty or sixty cents. The reason I am giving you the price, I am giving the price because I have had experience with the other lanterns, our lanterns are larger and better lanterns than those.

Q. 18. In what particular?

A. They are heavier and bigger and can stand tied here and can stand more heavy jars than this one; they are safer lanterns to ship with than those.

Q. 19. Are they larger?

A. Yes, sir, great big No. 2 burners and big globes, and they are larger, made more substantial.

Q. 20. Describe to the jury how you fastened these lanterns?

A. We put a nail in here.

Q. 21. Where did you put the nail?

A. Way up here at this here slat in the top part of the car, drove my nail through there, that is the way it goes up, gentlemen, a ten penny nail goes through up here and then drove in here half way, the head of it is bent back to here this way, and this here is a wood partition and at the top it is bent back to here. The head is in this wood that makes a staple and here is where I tied it; we taken the wire and tied it around here and run it over and fastened it
229 to the partition wall so; then, we let it run to here, and fastened it to the wall of the car.

Q. 22. Now in this particular instance, while we are on that point, how was that wire fastened, say the one on this side, especially as you faced the lantern as the car was moving, take that side of the lantern, which would be next to Louisville, how did you fasten that?

A. Let the wire bind it and fastened to the partition of the wall.

Q. 23. How did the other end fasten?

A. The other end fastened back to the end of the side wall there.

Q. 24. Not to a ring?

A. They might have ringed it to the partition on the wall.

Q. 25. You don't think you used the ring?

A. No, sir, my recollection is not to use the ring to use the nails.

Q. 26. Now the other side as the car moved would be the Lexington side of the lantern?

A. Run the wire here and put it back here to the wall of the car, nailed to the wall of the car, and this one went back here to the partition on the wall.

Q. 27. That is your recollection of how it was done?

A. That is the way it was done.

Q. 28. Well, the only colts that I caught that you said you breezed were the Miller Lady Beth colt, one-eighth of a mile in twelve seconds?

A. Twelve seconds.

Q. 29. Lewis had the others?

A. Yes, I seen them work.

Q. 30. You are a colored man, I believe, are you not?

A. Yes, sir.

230 LEWIS, WILLIAM, who, having been first duly sworn, testified on behalf of the plaintiffs:

Q. 1. Give the Court and jury your full name?

A. W. L. Lewis.

Q. 2. What is your occupation?

A. Training horses.

Q. 3. How long have you been so engaged?

A. About eleven years.

Q. 4. Where were you so engaged during the summer and fall or during the month of November, 1910?

A. I was at the Lexington Race Track out here.

Q. 5. Did you know at any time the Star Shoot, Last Cherry colt, belonging to Woodford and Ireland?

A. Yes, sir.

Q. 6. Where did you know that colt and when?

A. Well, I first knew that colt, the first time I saw the colt was at Saratoga, at the sale, and then I saw him at Mr. Ireland's stable after that.

Q. 7. When did you next see it at the stable?

A. It was after we shipped to Lexington here; I shipped first and Mr. Ireland came on later on and we were in the same stable at Lexington.

Q. 8. Did you know the Star Shoot, Blue Danube colt, belonging to the same parties?

A. Yes, sir.

Q. 9. Where did you know that colt and when?

A. Same time; saw him first at Saratoga before the sale and then at Mr. Ireland's stable, and then he was shipped down here.

Q. 10. Did you know the Miller, Lady Beth colt, belonging to the same parties?

231 A. No, sir, I did not.

Q. 11. Had you anything to do with any other of the colts or fillies belonging to the same parties and that were at the track out here in October, November and September, 1910?

Q. Yes, there was one filly by Ethelbert, brown filly, that I had charge of for a few days; saw her here in the stable and at Saratoga.

Q. 12. Did you know the Miller, Lady Premier filly?

A. No, I did not.

Q. 13. Did you train or have charge of any of those at any time?

A. Yes, I had the Star Shoot, Last Cherry colt, and the Star Shoot—Blue Danube colt. I had charge of those, I believe, for six weeks.

Q. 14. During the time you had them, Mr. Lewis, tell the jury what the disposition was, and describe the character and kind of colts they were?

A. Well, they were nice individuals, nice dispositions; had been well broken and showed a nice turn of speed.

Defendant objects to showing a nice turn of speed.

COURT: He may prove what sort of speed they had, if any.

Q. 15. Tell the jury what you know about it?

A. Well the first time I saw the horses worked, was when I had

charge of them. Mr. Ireland had the horses,—I think the horses had been broken for probably about thirty days, not over that, and Mr. Ireland and I were together at the time and he wanted me to see the colts working and have me time them.

Q. 16. Did you time them?

A. Yes, sir.

Q. 17. Did they work together?

A. Yes, they worked together.

Q. 18. Tell how they went?

232 A. Mr. Ireland in consideration of them—they had only been in thirty days and he told the boys——

Defendant objects, which objection is sustained by the Court.

Q. 19. Tell what they did.

A. The horses worked one-eighth of a mile in twelve seconds, the way I timed them; they went head and head, both hard held; they were not doing their best, they were just breezing. After Mr. Ireland turned the horses over to me I breezed them probably four days, three or four days, just as it suited. I never worked the horses fast, because——

Q. 20. You need not tell any conversation.

A. The fastest I worked the colts after that was a quarter in twenty-four and two fifths; they had a boy, one of them about one hundred and thirty pounds and the other one as much as one hundred and thirty five pounds, large boys; they were breezed all that time; they were never extended; never worked, just breezed; in the case of training horses we do not want them to go fast, we just light breeze them all the time, both hard held.

Q. 21. From what you saw of these colts and know of their breeding, tell the jury what was the fair market value of the Star Shoot-Last Cherry colt, on the 17th day of November, 1910?

A. Well, he looked to be a very valuable colt, the way I thought of him; I suppose the horse was worth $7,000.00, if he had been mine.

Q. 22. What in your opinion was the fair market value of the Star Shoot, Blue Danube colt, on the 17th day of November, 1910?

A. I thought more of the Blue Danube colt than I did the Last Cherry; he impressed me as being a horse of better promise and more speed than the other; I would place him at $8,000.00.

233 Q. 23. Do you know the Miller, Lady Beth filly?

A. I don't think I ever saw that filly; if I did, I didn't known her as the Lady Beth filly.

Q. 24. Did you know the Miller, Lady Premier filly?

A. No sir.

Q. 25. The Ethelbert-Miss Wicks filly?

A. Yes sir, I knew her.

Q. 26. Had you seen her there at the track?

A. Yes sir, I had her a few days and then I saw her work afterwards.

Q. 27. Tell the jury all you know about her disposition and work?

A. She had a nice disposition; and she was a blocky, nice indi-

vidual, well broke; the few days I had charge of her I did nothing but gallop her; I happened to be on the track afterwards when this other man had charge of her; I saw her work I think one-eighth of a mile in about twelve seconds.

Q. 28. From her average and what you saw of her, what would you say was her fair market value on the 17th day of November, 1910?

A. I think $1,000.00.

Q. 29. Did you know the Jack Point-Lady Vincent colt?

A. No sir.

Q. 30. Did you know the Star Shoot, Amy Davenport colt?

A. I saw that colt but I never knew anything about her.

Q. 31. Did you know enough of the breeding, and from seeing, breezing or such handling of that colt, to fix a value on that colt?

A. Only as to breeding. I never saw the two horses galloped or worked.

Q. 32. From your experience as a horseman, and from what you knew of his breeding, what would you say was the value of that colt on the 17th day of November, 1910?

234 Defendant objects.

Counsel for plaintiff withdraws the question.

Q. 33. Were you present at the track when the colts and fillies, I have mentioned, were loaded in that car for shipment?

A. Yes, I attended to loading the horses for Mr. Ireland.

Q. 34. In your own way tell the jury what sort of car it was and how it was loaded, and what you know about it, and who was present assisting in the work?

A. Well, it was an Arms Horse car, and Mr. Ireland had asked me to attend to the loading of the horses, and had told me how he wanted them loaded; he only——

Defendant objects.

COURT: State what you did.

A. I loaded the horses, the Star Shoot-Last Cherry and the Star Shoot-Blue Danube colt in one end of the car and the others, giving them plenty of room. I think three of the fillies, probably two, and these two colts, were put in one end of the car.

Q. 35. Do you remember how the stalls were in the car?

A. I don't remember now.

Q. 36. Do you know how the car was bedded?

A. Yes.

Q. 37. What was on the floor of the stall as you recall?

A. My recollection, wasn't anything except it was saw dust; I think it was saw dust, if anything.

Q. 38. Do you know what time you began the loading of that car?

A. About five o'clock, or possibly a little before five.

235 Q. 39. Do you know what time the loading was finished?

A. I left there I think about six o'clock, ten minutes of six, if I remember right.

Q. 40. At the time, tell the jury what had been put in the car?

A. Well, after the horses were loaded, there may have been probably a trunk or two, few bales of hay, probably three, I believe three or four bales of hay, a little oats, sack or two of oats, my recollection of it.

Q. 41. Were there any lanterns put in the car?

A. They had to use lanterns in loading the car, it had gotten dark and in order to load the cars we had to use lanterns, and when I left there, before I left there I asked the boy, I think his name was Chester—the boy who was in charge, Mr. Ireland's foreman, how he was going to light that car.

Defendant objects to any conversation.

Q. 42. Tell us who was there present when you left?

A. This boy Chester, the boy I think they called Go Devil I don't know what his other name was; I think they were the boys in charge.

Q. 43. Have you told us all the persons you recall as being there at the time you left?

A. There were several others helping to load the horses, I think probably one of them named Bob, or something of that kind; he brought some horses there; may have been a few men from my stable that brought the horses there, and helped to load them; I don't remember now who they were; probably all of my men.

Cross-examination:

Q. 1. You stated that you did breeze the Last Cherry-Star Shoot colt,—I mean the Star Shoot, Blue Danube colt?

A. Yes sir.

236 Q. 2. I don't know that I caught you,—when was that they were breezed one eighth of a mile in twelve seconds?

A. That was before I had charge of it.

Q. 3. You saw that done, though?

A. Yes sir.

Q. 4. And then they were turned over to you and you breezed them a quarter of a mile in twenty-four and two-fifths seconds?

A. Yes sir.

Q. 5. With one hundred and thirty pounds on one and one hundred and thirty-five pounds on the other?

A. Yes sir.

Q. 6. Do you recall which carried the one hundred and thirty and which the one hundred and thirty-five pounds?

A. I think the larger boy was on the Blue Danube colt.

Q. 7. Now you say as to the Last Cherry colt, you suppose if it was yours, you would have valued it at about $7,000.00?

A. Yes, I would put that value on him, if he had been my horse.

Q. 8. As to the value of the individual, if it had been your colt, what in your opinion would it have sold for at public sale?

Plaintiffs object which objection is overruled by the Court, to which ruling of the Court plaintiffs except.

A. He would have sold at public sale—Yes, I think if people had

been present that knew the horse as I knew him it would have sold for that.

Q. 9. I mean taking the ordinary public sale at that time—you recall this was the 17th day of November, 1910,—I will withdraw the first of the question,—what was the condition of the thoroughbred market in the country, at that time, was it or not depressed?

A. Yes, from what they had been before, a year or two before on account of conditions.

237 Q. 10. This was in November—now the value of the colt on the 17th day of November, 1910, Mr. Lewis, under the conditions that the thoroughbred market was at that time in the country, it is your opinion that that horse put up there at Mr. Woodford's sale, would sell for $7,000.00?

A. I had seen the horse well——

Q. 11. That horse put up at that time, do you suppose that horse put up at one of Mr. Woodford's sales on the 17th day of November, 1910, do you think he would have sold for $7,000.00?

A. I believe he would, the way the horse had worked, and the way he looked.

Q. 12. If I were to say to you that that horse sold at Mr. Woodford's sale at Saratoga on the 11th day of August, previous to that time, for $1,600.00, would that affect your judgment in any respect?

A. No, because I had seen the horse work afterwards and he showed what he would do.

Q. 13. Do you consider a quarter of a mile in twenty-four and two fifths anything striking in the way of time?

A. No sir.

Q. 14. Then to what do you contribute the increase in the value in that case?

A. The way in which he worked, the quarter in twenty-four and three fifths.

Q. 15. That was ordinary time wasn't it?

A. Nothing extraordinary, nor sir.

Q. 16. How much in the valuation of the Last Cherry colt—how much did you estimate as to the value of pedigree and how much value to the individuality—apportion it between the two; pedigree has a great deal to do with the valuation of thoroughbreds?

A. A great deal.

238 Q. 17. You have said by reason of the pedigree and individuality, that horse in your opinion was worth $7,000.00,—how do you proportion the value of that pedigree and individuality as to that animal?

A. I don't know how I could answer that.

Q. 18. If you were selling him, how much does the value of pedigree enter into that judgment?

A. Without the individuality, I would not value the pedigree a great deal.

Q. 19. Suppose that colt had been by Miller out of Last Cherry, instead of by Star Shoot?

A. I would add fifty per cent or more, on account of being by Star Shoot, instead of Miller.

Q. 20. Miller is one of his stallions?

A. Yes, he was a — stallion then.

Q. 21. You would have estimated the difference between the two at that time at fifty per cent or more?

A. O, yes, I value the breeding very much.

Q. 22. You say this was over a year ago?

A. Yes sir.

Q. 23. What was the condition of the thoroughbred market then, was it very much depressed?

A. Yes sir.

Q. 24. Is it not a fact that the passage of what was known as the Hughes Law in the State of New York, and similar legislation in a number of other states, was what was regarded as detrimental to the value of race horses?

A. Yes, I think so.

Q. 25. And didn't it diminish the demand a very great deal,—diminish the price?

A. I think so.

Q. 26. And still you think that colt would have sold, under those circumstances, at public auction, at one of Mr. Woodford's sales, at $7,000.00?

A. If he had been breezed and worked like he had, I think he would.

239 Q. 27. With his time at twenty-four and three fifths?

A. No, not that altogether; he had worked faster than that; I had seen him work faster than at one-eighth.

Q. 28. You gave the time at a quarter in twenty-four and three-fifths?

A. Yes, I had seen him work faster than that.

Q. 29. Now going back to the Danube colt, I believe you said you thought the Danube colt was more valuable than the Last Cherry colt?

A. Yes sir.

Q. 30. You valued that at $8,000.00; upon what did you place your valuation of that more than the other one?

A. Well, their breeding was good; I liked the breeding of the Blue Danube better than I did the breeding of the Last Cherry; and then the way the colts worked for me; in working them, the gait and the manner in which they worked, I was impressed with one colt more than the other; I liked one better than I did the other.

Q. 31. You were present at the Saratoga sale, were you not?

A. Yes sir.

Q. 32. Do you recall what that Blue Danube colt brought?

A. I think $1,600.00.

Q. 33. How many days of handling out there had these colts had, do you recall,—that sale was on the 11th day of August, 1910, when did they come into your hands first?

A. My recollection is along about the 29th; it was at the close of the meeting here; may be the 4th or 5th day of October.

Q. 34. They went into your hands somewhere about the first of October?

A. At the close of the meeting here.

Q. 35. And they were handled every day?

A. Yes sir.

240 Q. 36. Out on this track?

A. Yes sir.

Q. 37. Had they been handled up to the day they had been shipped?

A. Galloped the morning they were shipped.

Q. 38. That would have been about six weeks?

A. I had them about six weeks.

Q. 39. That was all the handling they had?

A. O, no, Mr. Ireland had them at Saratoga; broke them at Saratoga. The time they worked and the time Mr. Ireland had them, they had been handled then about thirty days I think from the time they were broken.

Q. 40. You have conversed with Mr. Woodford or Mr. Ireland about the values of this stock?

A. Mr. Ireland and I had a talk about the colts before he ever turned them over to me.

Q. 41. Well, I mean since the accident, you were asked to put a value on the stock?

A. Probably about the time of the fire, I timed the horses with him. We talked about it; I don't think since that I have had any conversation with one or the other of these gentlemen.

Q. 42. Didn't Mr. Ireland and you agree that about $8,000.00 was right for that?

A. No, we never agreed anything of the kind.

Q. 43. I didn't ask—I meant that was your opinion?

A. Mr. Ireland and I had discussed these horses before they were turned over to me. He was made an offer on this horse——

Q. 44. Never mind about the horse.

A. We discussed it at that time, and after the fire.

Q. 45. And you then thought before the fire that this one was worth $8,000.00?

A. My recollection is, I think he asked me something about these horses, and that I said I would not take $7,500.00 a

241 piece if they were mine. If he was going to train the horses, what did he want to sell this kind of horses for.

Q. 46. Do you recall when that conversation occurred?

A. I think a few days before the Lexington Meeting; probably about the first of the Lexington meeting; somebody made him an offer on these two colts.

SEAY, Dr. C. D., who having been first duly sworn testified on behalf of the plaintiffs as follows:

Q. 1. Where do you live?

A. Frankfort.

Q. 2. What is your profession?

A. Veterinary Surgeon.

Q. 3. How long have you been practicing as a veterinary surgeon?

A. Since 1892.
Q. 4. Are you a graduate of any school?
A. New York College of Veterinary Surgery.
Q. 5. When did you graduate?
A. In March, 1892.
Q. 6. Have you practiced your profession since that?
A. Yes sir.
Q. 7. Where were you, Doctor, on the night of the 17th of November, 1910?
A. Frankfort.
Q. 8. On that night did you see any horses belonging to Woodford & Ireland?
A. Yes, said to belong to them.
Q. 9. Where did you see those horses?
A. At the stable .
Q. 10. What stable?
242 A. Manford's.
Q. 11. Where is that located, with reference to the Capital Hotel?
A. It is in front of it.
Q. 12. How many horses did you see there?
A. Six.
Q. 13. Was one of those horses pointed out to you as Marsand?
A. Yes sir.
Q. 14. Excluding Marsand from your testimony, tell the jury the condition in which you found the other five horses?
A. Well, I found them all more or less burned, and one fearfully burned.
Q. 15. Describe the condition of that one that was fearfully burned?
A. Well, his nostrils were burned and he was burned practically all over.
Q. 16. What was the condition of the others?
A. Well, the others, some of them had their tails singed and their manes burned off, and spots burned about on them.
Q. 17. What time in the night of the 17th of November, was it that you saw those horses?
A. It was half past twelve; that would be the 18th, when I was putting on my clothes.
Q. 18. When you got there, who did you find with those horses?
A. I found a colored boy, and Will Gordon, the policeman.
Q. 19. Mr. Gordon who testified here?
A. Yes sir.
Q. 20. You mean Fred Gordon?
A. Yes sir, and Henry the stable man there.
Q. 21. Where did you go, if anywhere?
A. Well, directly the other man came in and said he had been telephoning Mr. Woodford.
243 Q. 22. The one you found when you got there, was the yellow or the black one?

A. No, the black one.
Q. 23. Did you notice the yellow one?
A. Yes sir.
Q. 24. What was his condition?
A. He was burned around the ears and nose.
Q. 25. Did you go, Doctor, over on the west side of the Kentucky River, down to the yards there?
A. Yes sir.
Q. 26. What did you go there for?
A. I made several trips over there; I attended those horses here first, but I went over, went and got some blankets and put on them and got some medicine and dressed their wounds; and when I got through with them, I went over there.
Q. 27. What was the condition of those, how did you find them?
A. In a car at the stock yards; they were burned awfully, and no possible chance to get them out; I dressed the wounds and left there until day.
Q. 28. Who accompanied you there?
A. Pete Lillis and Uncle Joe Martin, a policeman in Frankfort.
Q. 29. Any one else?
A. I believe that is all I can remember now.
Q. 30. Where did you find those horses in the car; do you remember what part of the car?
A. Yes, in the end towards Frankfort, the west end.
Q. 31. You mean towards Louisville or Frankfort?
A. Towards Louisville.
Q. 32. On which side of the car were they?
A. On the left hand side as you go to Louisville.
Q. 33. Did you see Dr. Shannon in Frankfort that night at any time?
244 A. Yes, I came back and Dr. Shannon came and him and I went over there and saw the same thing.
Q. 34. What disposition was made about the horses you found in the car over to West Frankfort?
A. They were destroyed.
Q. 35. Why?
A. Because they were burned so horribly, they didn't have a chance to get well, and it was for humanity's sake.
Q. 36. Who destroyed them?
A. Dr. Shannon killed one, and I killed the other.
Q. 37. What became of the horses you found at the livery stable, across from the Capital Hotel?
A. We destroyed one of them there, and then the others we treated.
Q. 38. What did you destroy that one for?
A. He didn't have any possible chance in the world to get well.
Q. 39. At what time did you destroy the one at the livery stable?
A. I suppose about six o'clock.
Q. 40. And when were the other two at West Frankfort destroyed?
A. About seven o'clock—no, I guess eight o'clock, for we didn't

get unloaded off the car until eight o'clock, and we had to get them unloaded before we could tell exactly how bad they were affected.

Q. 41. Are you well enough acquainted to tell this jury what effect the experience these horses had in that burning car that night, and the condition you found them—what effect that would have upon their dispositions hereafter?

Defendant objects, which objection is sustained by the Court, to this ruling of the Court plaintiff excepts.

Q. 42. Have you seen these horses since that time?

A. No sir.

Q. 43. What was their condition that night?

A. Very much excited; they were in a terrible fix, just shaking; they were excited as badly as they could be.

245 LILLIS, P. B., who having been first duly sworn, testified on behalf of the plaintiffs, as follows:

Q. 1. Where do you live?

A. Frankfort.

Q. 2. How long have you lived there?

A. Forty-nine years.

Q. 3. What is your business?

A. I represent the Standard Oil Company, in the Frankfort territory.

Q. 4. Where were you on the night of the 17th day of November, 1910?

A. Well, I was in Lexington the fore part of the night.

Q. 5. What time did you go back to Frankfort?

A. About 12:30.

Q. 6. Did you see any burned horses there that night?

A. Yes sir.

Q. 7. Where did you see them?

A. I saw the first one at Manford's stable.

Q. 8. How many did you see there?

A. I saw six horses.

Q. 9. Tell the jury the condition of those horses that night when you saw them there?

A. Well, the horse in the first stall he was badly burned about the head and nose and back, and there was one or two others that were slightly burned, one on the nose and there was some I don't think burned at all; I didn't look at these, I just saw the ones that were burned.

Q. 10. Do you know what disposition was made of any of the horses you found there at the stable?

A. That horse in the first stall was killed.

Q. 11. Did you see it killed?

A. No sir, I saw him shortly after he was killed.

246 Q. 12. Do you know why he was killed?

A. This veterinary said he couldn't get well; didn't have and chance.

Q. 13. Did you see any more burned horses there that night?
A. Out at the car I did.
W. 14. Where were they?
A. They were in the car.
Q. 15. Describe the condition of the horses you saw in the car?
A. Well, one of them was burned about like the one at the stable, in the first stall, burned considerably on the head and back?
Q. 16. How about the other one?
A. The other one wasn't burned as bad.
Q. 17. Did you see them more than once?
A. Yes sir.
Q. 18. What disposition was made of them?
A. Well, I was there when that one was brought where it was killed.
Q. 19. What time was that?
A. In the morning, I suppose about seven o'clock.
Q. 20. Did you see the other one after that?
A. I saw the other one at that time, but not after that, no.
Q. 21. When you went to the stable, Mr. Lillis, who was there about those horses?
A. Well, there was a yellow fellow and a black boy and the stable boy.
Q. 22. Had you just arrived there from Lexington on the car?
A. No sir, I was in an automobile, got off below there.
Q. 23. And have you seen the yellow fellow and the black boy since then?
A. Yes sir.
Q. 24. Do you know their names now?
A. No sir.
247 Q. 25. What did you see them do there with reference to those horses?
A. Well, they were helping to hold the horses while the veterinary put the medicine on them; I helped him.
Q. 26. What veterinary?
A. Dr. Seay.
Q. 27. Did you see any other veterinary there at any time?
A. On the next morning.
Q. 28. Who?
A. I don't know his name; I believe his name is Shannon.
Q. 29. Do you know whether or not he was present at the time any of these horses were killed?
A. No sir, I don't.
Q. 30. When you went over to that car, do you remember the condition the car was in?
A. Yes, I have a recollection of it, I think.
Q. 31. Tell the jury?
A. Well, the west end——
Q. 32. You mean towards Louisville?
A. Yes sir, it was considerably, awfully burned around here and

disorderly; there was some planks burned, I helped pull one from under one of the horses, so he could have more room.

Q. 33. What was on the floor of that car?

A. Some straw and a sack of oats was laying there; scattered around burst open and scattered around, and probably some hay.

Q. 34. Did you notice a lantern there?

A. I noticed part of it; the frame part was hanging up between the two doors.

Q. 35. In which end of the car?

A. Between the doors, in the west end towards Louisville.

Q. 36. Where was the other part of the lantern that was hanging up?

248 A. It was laying over in this stall to the right of the partition,—to the north door.

Q. 37. And in which end with reference to Louisville?

A. West end.

Q. 38. Towards Louisville?

A. Yes sir.

Q. 39. And in which stall in the end was it?

A. In the right hand side as you — in from the north.

Cross-examination:

Q. 1. Are you a veterinary?

A. No sir.

Q. 2. You say you went over the next morning to the west part of Frankfort, to where the car was?

A. Yes sir.

Q. 3. At whose instance?

A. Well, on my own.

Q. 4. Were you interested in any way in the matter?

A. No sir, just felt sympathy for the horses.

Q. 5. Where did you find those two horses?

A. Found them in the west end of the car.

Q. 6. In what stalls?

A. The car is divided into two parts like here, I found one in this stall and one in this particular one.

Q. 7. Let's call the end that way Louisville end of the car and the stall in the corner you call the north corner, was anything in there?

A. Yes, I think a part of a lantern and some straw and probably loose oats scattered around.

Q. 8. Any oats scattered around in that stall?

A. Partly on the edge as you go into it.

Q. 9. Where was the straw scattered?

249 A. O, that was all around the floor in that section.

Q. 10. And the part of the lantern you discovered there, was what part?

A. Bottom part.

Q. 11. Where was it?

A. I would think they ain't half way back of the stall, towards the end.

Q. 12. Was it covered up?
A. No sir, laying on top of the straw.
Q. 13. Did you discover anything burning in that stall?
A. Some of the planks, all around, I would think the side of the stall, and some of this straw had been burned.
Q. 14. Inside of the stall?
A. Yes, in a part of the way.
Q. 15. What part of it?
A. It was burned worse as you went in; on the outside edge was worst.
Q. 16. Towards the aisle?
A. Yes sir.
Q. 17. How far did that burning extend in there?
A. Well, I couldn't say; I didn't notice it particularly; there was a few straws you could notice burning back where the lantern was.
Q. 18. Did you inform yourself sufficiently there to give us an opinion of how long that stall was—suppose the horse's head was pointed to the aisle where the door was, how long was that stall?
A. Well, I would judge six or seven feet.
Q. 19. Now in the corner of that stall, north corner of that stall, was there any burning there?
A. I didn't go back that far.
Q. 20. Could you tell about where that part of that lantern was?
250 A. About half way back.
Q. 21. From the engine?
A. Yes sir.
Q. 22. Was it in the corner?
A. No sir, just about middle ways from one side to the other.
Q. 23. How wide would you say these stalls were?
A. I would suppose about four feet.
Q. 24. And part of the frame of the lantern you say was hanging to the aisle?
A. Kinder overhead between the two doors, or half way probably between the horses' heads.
Q. 25. In that aisle?
A. Yes sir.
Q. 26. Was it attached to anything?
A. It was hanging way up above, there was some wires on it.
Q. 27. Did you notice where the ends of those wires were?
A. One of them was attached to the post between the two horses and the other one was going south to that side; then there was one wire I noticed hanging down, it was broken off.
Q. 28. From which end did that seem to be attached, from the end of the stall of the car or from the end nearest the lantern?
A. I don't remember where that broken wire was hanging; I just noticed the wire att-ched and this was dangling down.
Q. 29. Did you examine to see where the two wires were attached?
A. No sir.
Q. 30. Did you notice if there was a horse in that rear stall——
A. No sir, not when I saw it.

Q. 31. And you don't know what became of that horse that had occupied that stall?
A. I don't know which one of the six that was at the stable.

251 Dr. SEAY recalled for cross-examination:

Q. 1. Do you know which one of those colts occupied the north stall, calling the Louisville end the south end of the car and the stall that was the north end the corner of that car?
A. I couldn't tell you, no sir.
Q. 2. When you got back there, do you know which two colts you found in the car?
A. One was a filly and the other a colt; I won't be certain whether it was a colt or not, I am under the impression it was.
Q. 3. Where were they?
A. They were in the far end of the car, one was, and the other was in the stall just this way.
Q. 4. Was the stall in the north corner of that car occupied by any horse at all?
A. Only this one.
Q. 5. Here in the middle?
A. My impression is that he was.
Q. 6. Was he standing in that stall when you got there?
A. Yes, some timbers had fallen around him and he couldn't turn around.
Q. 7. Describe the appearance of that one?
A. This one I didn't get to examine until late, he was fearfully burned, face, body and back.
Q. 8. What part of the body?
A. On the side of the back, tail burned off and his nose was all burned.
Q. 9. The chief burn was towards the nose in front?
A. They were the worst burns. I think he inhaled some of the flames.
Q. 10. I wish you would describe professionally the burns, after leaving the head and back, where they were located on that horse?
A. All along the back—you mean all of them?
252 Q. 11. That one horse.
A. All along he was singed, and he looked almost in a sloughing off condition and the tail burned, and they were burned kinder on the sides.
Q. 12. Which side?
A. On both sides, underneath.

Dr. JAMES T. SHANNON, who having been first duly sworn testified on behalf of the Plaintiffs as follows:—

Q. 1. What is your profession?
A. Veterinary.
Q. 2. How long have you practiced that profession?
A. Fourteen years.
Q. 3. Did you know a Star Shoot, Last Cherry colt, belonging to Woodford and Ireland?

A. Yes sir.

Q. 4. Did you know Star Shoot, Blue Danube colt, belonging to Messrs. Woodford & Ireland?

A. Yes sir.

Q. 5. How long did you know those two colts?

A. Well, I saw them out at the track several times, I suppose may have been six weeks prior to the accident.

Q. 6. Did you know a Miller, Lady Beth filly?

A. Yes sir.

Q. 7. How long had you known that one?

A. About the same length of time.

Q. 8. Did you know a Miller, Lady Premier filly?

A. Yes sir.

Q. 9. How long had you known that one?

253 A. About the same time.

Q. 10. Did you know Ethelbert Miss Wicks filly?

A. Yes sir.

Q. 11. How long had you known that one?

A. About the same time.

Q. 12. Did you know the Jack Point, Lady Vincent colt?

A. Yes sir.

Q. 13. Did you know a Star Shoot, Amy Davenport colt?

A. Yes sir.

Q. 14. How long had you been knowing that one?

A. Two months or six weeks.

Q. 15. Tell the jury what kind of colts and fillies they were that you knew?

A. Well, Star Shoot, Last Cherry was a chestnut colt, nice size horse, and the other colt was about the same size, the Star Shoot Blue Danube, both nice individuals; and the Miller filly was a nice filly, medium size filly, and Lady Beth a nice filly.

Q. 16. What about this Star Shoot, Amy Davenport colt?

A. He was a nice individual.

Q. 17. Are you acquainted with race horse values?

A. Yes, I think I am.

Q. 18. Tell the jury what in your opinion was the fair market value of the Star Shoot, Last Cherry colt, on the 17th. day of November, 1910, prior to the accident?

Defendant objects.

Q. 19. Have you had experience in these matters?

A. Yes sir.

Q. 20. With race horses?

A. Yes sir.

Q. 21. And as to their values what they would sell for?

A. I go to nearly every sale we have here and in New York.

254 Q. 22. Now tell the jury what in your opinion was the fair market value of the Star Shoot, Last Cherry colt belonging to Woodford & Ireland, on the 17th day of November, 1910, prior to the accident?

A. I would value that colt at about $7,500.00.

Q. 23. What in your opinion was the value of the Star Shoot Blue

Danube colt belonging to the same parties, on the 17th day of November, 1910, prior to the accident?

A. $5,000.00.

Q. 24. What in your opinion was the fair market value on the 17th day of November, 1910, of the Miller, Lady Beth filly?

A. About $1,500.00.

Q. 25. What in your opinion on the 17th day of November, 1910, was the fair market value of the Miller, Lady Premier filly?

A. I forget the breeding of the Lady Premier; I would like to see it if you have it convenient. The Miller, Lady Premier filly was out of Lady Premier, by Prince Banasco.

Q. 26. What would you say was the fair market value of that one?

A. About $1,500.00, $1,200.00, to $1,500.00.

Q. 27. Did you know the Ethelbert, Miss Wicks filly?

A. Yes sir, I have seen that filly a number of times.

Q. 28. What in your opinion was the value of the Ethelbert—Miss Wicks filly, on the 17th day of November, 1910, prior to the accident?

A. About $1,200.00.

Q. 29. As I understand you didn't know the Jack Point filly?

A. No.

Q. 30. What in your opinion was the value of the Star Shoot, Amy Davenport colt, on the 17th day of November, 1910, prior to the accident?

255 A. About $2,000.00, to about $2,500.00.

Q. 31. You saw these horses, did you not, on the night of the 17th at Frankfort?

A. Yes sir.

Q. 32. Describe the condition of the Star Shoot, Last Cherry colt when you saw it there?

A. He was at Frankfort in the stable at the Capital Hotel, and he was burned about the head, body and legs, and his nose and eyes, his eyes were practically burned out, and I destroyed that colt in the barn.

Q. 33. Why did you?

A. Because he was so fearfully burned that there was no chance to save him, and I thought the best thing to do was to get rid of him to release him from his pain.

Q. 34. What was the condition of the Star Shoot Blue Danube colt, when you saw him?

A. He was in the car when I first saw him. We had to kill him later after we got the car set on the shoot. He was burned worse than the Last Cherry colt.

Q. 35. What disposition was made of that one?

A. I destroyed him.

Q. 36. Why?

A. The same condition as the Last Cherry,—there was no chance to save him.

Q. 37. What was the condition of the Lady Beth filly?

A. I saw her, but she wasn't as bad off as the other two, but she

was destroyed the next day. I destroyed the two colts and Dr. Seay destroyed the filly.

Q. 38. If you saw the condition of the Lady Premier filly, what would you say was her value after that accident?

A. If she would not do to race, there ain't much value; a couple of hundred dollars.

256 Q. 39. You saw the condition of the Ethelbert, Miss Wicks filly,—what would you say was her fair market value after the accident?

A. O, about two or three hundred dollars.

Q. 40. What would you say was the value of the Star Shoot, Amy Davenport colt after that accident?

A. About $500.00.

Q. 41. How did you happen to go to Frankfort?

A. I was telephoned to come down.

Q. 42. Do you recall when you got that telephone message?

A. Yes, I got it at either one or two o'clock in the morning.

Q. 43. Do you recall what time you got to Frankfort?

A. It was about four o'clock, between four and five, I don't think later than four.

Q. 44. When you got there, who did you find with those horses there?

A. There were two colored men had charge of the horses.

Q. 45. Do you know who they were?

A. One yellow man and the other a black boy.

Q. 46. Was one Chester Frakes and the other Go Devil, Horace Moore?

A. Go Devil, that's his name.

Q. 47. How were they occupied, if at all, with reference to those horses while you were there?

A. All the horses were in the livery stable, with the exception of the two on the train. They had them there and they had fed all of them, except the Last Cherry colt, he was in such a condition that he couldn't eat, but they had a blanket on him. All the other horses had been treated by Dr. Seay when I saw them.

257 Cross-examination:

Q. 1. Do you know what colts were left in the car and were in the car when you got there?

A. One colt and a filly.

Q. 2. What was the colt?

A. It was the Blue Danube.

Q. 3. What stall was that in, do you recall?

A. Well, I forget exactly, but it was in the west end of the car. Those two were in the west end; one was tied facing Louisville; I don't know whether the filly, but one was facing Frankfort.

Q. 4. You saw the Last Cherry colt?

A. Yes sir.

Q. 5. Where did you see that?

A. He was in the livery stable opposite the Capital Hotel.

Q. 6. Describe that, all the burns on the colt?

A. His nostrils and his tongue, eyes, ears and neck and legs, especially between the hind legs, and all over his back was burned.

Q. 7. Which was the worst burned one of them?

A. I think the Danube colt, the one left in the car.

Q. 8. Have you been the owner of race horses, or the breeder of race horses?

A. Yes, I have got one.

Q. 9. How did you acquire that, by breeding or by purchase?

Plaintiffs object.

COURT: Let him answer it.

A. I bought her.

Q. 10. Are you familiar with the prices that were obtained in this country for thoroughbreds, about the 17th day of November, 1910?

258 A. Yes sir.

Q. 11. How did you acquire your information?

A. Well, about that time it looked as if thoroughbreds were going to be high.

Q. 12. In November, 1910?

A. Yes sir, they had changed Governors in the State of New York, and the opinion was that they were going to have racing at Sheepshead Bay and Saratoga. Governor Hughes had been defeated and it looked like Governor Dix was in favor of racing. For that special reason in New York, thoroughbreds would have been valued high at that time.

Q. 13. Were you at the Chicago sale in 1910?

A. No sir.

Q. 14. Now let us take the Blue Danube colt, what valuation did you put on that?

A. $5,000.00.

Q. 15. In arriving at your opinion as to the value, what elements do you consider?

A. That Blue Danube is a full sister to Sallie McCleland she was a good blood mare, and good producer, and then full sister to another good mare, and one of her colts sold high at the same sale.

Q. 16. What value or importance do you adjudge to the sire?

A. It has one of the best sires we have; he is a premium sire this year.

Q. 17. Pedigree has a great deal to do with, doesn't it, and especially the pedigree of which sire or dam?

A. Both.

Q. 18. Which enters into it most largely, or most generally?

A. You would want both—I would rather have a good dam.

Q. 19. You take a strain like the Lexington strain that was transmitted to four or five generations wasn't it?

259 A. Yes sir.

Q. 20. Doesn't the strain of the sire add very greatly to the value of the animal?

A. I think it does, more to the mare than it does the horse.

Q. 21. Suppose that about $8,000.00—what value did you put on the Blue Danube?

A. $5,000.00.

Q. 22. What proportion of that valuation would you attribute say to the sire?

A. That would be hard to say.

Q. 23. Best you can do at it.

A. Four and a half or a third. I would not know how to divide for a pedigree like that; you couldn't buy a colt unless you knew the dam of him.

W. 24. Take that dam there, there is a Star Shoot out of Blue Danube, as between them you have got to consider this blood, don't you?

A. Yes sir.

Q. 25. You consider the strain of the blood of both dam and sire? How do you proportion that between the two?

A. I don't understand your question.

Q. 26. Do you know what the blood of the Blue Danube is?

A. Yes sir—what are you comparing that with, what other colt?

Q. 27. I am comparing those two bloods, one with the other.

A. Comparing the dam to the sire?

Q. 28. Yes.

A. I would take the sire.

Q. 29. Would it be the half as against the half, or one-fourth in favor of the horse?

A. How are you comparing them, are you going to put them up to sell them, I would take the stallion every time.

Q. 30. And so with each of those others, the Last Cherry and all of them?

260 A. Yes, take the sire.

Q. 31. And prize that most highly?

A. Yes sir.

Q. 32. And the general estimate that is put upon them by the public, and what influences you in the purchase is their blood is it not?

A. Yes sir.

Q. 33. Very greatly?

A. Yes sir.

SMITH, POLK, who having been first duly sworn testified on behalf of the plaintiffs.

Q. 1. Where do you live?

A. Frankfort.

Q. 2. How long have you lived there?

A. Forty-five years.

Q. 3. Were you in Frankfort on the 18th day of November, 1910?

A. Yes sir.

Q. 4. Did you see there any burnt horses, belonging to Woodford and Ireland?

A. Yes sir.

Q. 5. Where did you see them?
A. Well, the horses were in the stable when I saw them.
Q. 6. Where?
A. Just opposite the Capital Hotel.
Q. 7. How many horses were there?
A. Five in the stable.
Q. 8. Was one of those five pointed out to you as Marsand?
A. Yes sir.

261 Q. 9. In testifying further, have nothing further to say about Marsand; confine your testimony to the other four—do you know how many horses, all told, were at that stable before you went there, not counting Marsand?

A. I think there were five there.
Q. 10. When did you first see those horses?
A. About ten o'clock on the morning of the 18th day of November.
Q. 11. Did you see the one killed there?
A. No sir, that was killed before I got there.
Q. 12. Tell the jury the condition of the four that you did see, with reference to the burns and the like?
A. Well, there was one of them up near the aisle of the barn in the stable, he was in a bad shape; the others were burned badly on the nose and face and most all burned out here and back on the neck.
Q. 13. Did you go to the car in West Frankfort?
A. Yes sir.
Q. 14. Did you see any horses in that car?
A. No sir, wasn't any horses in the car when I went over there.
Q. 15. Did you see any horses there?
A. One out in the cattle pen there.
Q. 16. Who went with you?
A. Mr. Ireland.
Q. 17. Any one else?
A. Not in the morning me and Mr. Ireland went, is my recollection about it.
Q. 18. Did you go back again?
A. Yes, Mr. Ireland and Dr. Seay I think went this last time.
Q. 19. What was done when you got over there with reference to the horses?
A. That one that was badly burned, we carried the veterinary back with us; I told Mr. Ireland in the morning that I thought this horse ought to be destroyed, and he said, "We will go and see the veterinary."

262 Q. 20. Tell what was done?

A. Well, the veterinary went back with us, and the veterinary said he would have to destroy that horse that afternoon between three and four o'clock.
Q. 21. Did you see the car?
A. Yes, sir, I went into the car.
Q. 22. When did you see that car?
A. In the morning and evening both

Q. 23. Describe the condition of that car with reference to having been burned?

A. Well the west end of the car was burned pretty badly.

Q. 24. Is that the end towards Louisville?

A. Yes sir; this end wasn't burnt as badly as that end was.

Q. 25. Describe the burns in the car as near as you can?

A. It was burnt badly the straw and saw dust and sack of oats were partly burned up and everything around there was burned on the floor.

Q. 26. Did you see anything of a lantern or parts of a lantern there?

A. Yes sir, the frame part was hanging up in the car.

Q. 27. Where was the other part?

A. The part with the oil in it was laying back in the stall on the right hand side as you go in the first stall about half way back on the floor.

Q. 28. What was in the stall besides that piece of lantern?

A. Part of the globe was there, some glass was lying there.

Q. 29. Was there any saw dust or anything of that kind?

A. Yes sir, saw dust was there burnt black.

263 Cross-examination:

Q. 1. What is your occupation?

A. In the horse business.

Q. 2. In what—breeding, racing, or selling or dealing?

A. Dealing in horses.

Q. 3. Have you a livery stable?

A. No sir, I buy and sell horses.

Q. 4. Where and when did you first see any of these horses?

A. About ten o'clock, I think, or half past nine the next day.

Q. 5. Who was with you when you went to see them?

A. I think possibly Joe Weitzel, went over there with me; I was at the hotel.

Q. 6. And you went across to the stable?

A. Yes sir.

Q. 7. Whom did you meet over there?

A. I met Mr. Manford, the man that owns the stable.

Q. 8. Where did you first meet Mr. Ireland?

A. At the depot; I went to the depot and met him; Joe Weitzel told me he had heard he would be there that morning.

Q. 9. Where did you and Mr. Ireland go from that point?

A. Across over to the car where it was wrecked at.

Q. 10. You did not go up to the stable where the horses were first?

A. No sir.

Q. 11. What time did you and he go to the wreck?

A. I think we went about twelve o'clock.

Q. 12. Were any of the living animals in that car?

A. No sir there wasn't one in the lot.

Q. 13. You don't know what became of them there?

A. No sir.

Q. 14. You looked into the car with Mr. Ireland?
A. Yes sir.
264 Q. 15. At whose instance did you go?
A. No one's at all.
Q. 16. Just went with him?
A. Yes sir.
Q. 17. What part of these animals seemed to be the most burned?
A. Well, the one that was alive in the lot?
Q. 18. Yes.
A. I think the head part of that one.
Q. 19. Now those over in the stable, how about them, which part was most burned?
A. The bay mare was burned where all of them was, on the back?
Q. 20. Up on top of her back?
A. Yes sir.
Q. 21. And then about the head the others of them?
A. Yes sir, foretop and part of the mane burnt off.
Q. 22. Chiefly all the burns were confined to the fore part of the animal?
A. All except her, her hair and mane were scorched too.
Q. 23. What did you discover that was not burned in the car, anything—was there any hay in there that you could see?
A. No sir.
Q. 24. What was on the floor, anything you saw?
A. Part of a sack of oats setting there by the door.
Q. 25. In which aisle?
A. Aisle at the west end.
Q. 26. On which side of the car was that?
A. On the right hand side as you go in the door.
Q. 27. Was it just against the side of the door?
A. Setting up on the side of the car, yes sir.
Q. 28. What was there in the stall, in the shape of hay or stuff?
265 A. There wasn't any hay there left that had not been burnt, the saw dust that was burnt all black; looked like saw dust.
Q. 29. All of it?
A. Except right in the back end, there may have been a little there that wasn't burned.
Q. 30. What was in there wasn't burned?
A. All except at the right end; I would not say positively whether that was burned or not.
Q. 31. Did you see any parts of a lantern?
A. I did see, yes sir, the part that holds the oil was back about half way in that stall.
Q. 32. Back half way from the aisle, back towards the rear part?
A. Yes, about half way in the stall part.
Q. 33. Where was the balance of it?
A. Part of the frame part was hanging up.

Adjourned to two o'clock P. M.

Met pursuant to adjournment.

NEAT, Dr. J. D., who having been first duly sworn testified on behalf of the plaintiffs as follows:

Q. 1. Where do you live?
A. Versailles.
Q. 2. How long have you lived in Woodford County?
A. Born and raised there.
Q. 3. What is your profession?
A. Until the past three years I have practiced as a physician, but three years ago I retired from medicine; now I am having a stock farm.
266 Q. 4. Were you a graduate physician?
A. Yes sir.
Q. 5. How long since you had your diploma?
A. I got my diploma in 1876.
Q. 6. Are you acquainted with thoroughbred horses?
A. I have bred thoroughbred horses for twenty-five years.
Q. 7. Have you kept up with the pedigrees and values of race horses?
A. Yes sir, that is part of the knowledge of thoroughbred race horses, to keep posted on their values.
Q. 8. Are you acquainted with the breeding of a stallion known as Star Shoot?
A. I have seen and heard of the Star Shoots. He is an imported horse.
Q. 9. Do you know the market value of such horses during the last—how many years did you say?
A. I have bred for twenty-five years; I have of course kept up in a general way with the market values during that time.
Q. 10. Would you know the breeding of a colt by saying he was a Star Shoot—Last Cherry colt?
A. Yes sir, I would know what that meant in the breeding line.
Q. 11. Assuming that the plaintiffs' chestnut colt by Star Shoot, dam Last Cherry, dam Cheola was one year old the spring of 1910; that they commenced breaking May 12th; that after he was
267 broke he was given ordinary work up to the 8th day of September, 1910; that on the 8th day of September, 1910, he was breezed one-eighth in eleven and four fifths; that thereafter he was given ordinary work up to the time of the accident on the 17th day of November, 1910, at Frankfort, Ky., or two days prior to that, he was breezed one fourth in twenty-four and three-fourths, with about one hundred and thirty pounds up; and assuming that he was, just before and at the time of this destruction by fire on November 17, 1910, sound, of good action, well broken and of good disposition,—what in your opinion was the fair market value at the time of his destruction on November 17th, 1910?
A. The way you get up that valuation, he was by Star Shoot the most popular sire in America; he was out of a dam that produced very high class race mares, that kind of colt by Star Shoot, the

premium stallion of America, and being half brother to a very high class winner, a good individual, sound, kind disposition, well broken, and had showed a good time,—that colt would be among the very highest prices in the country, and I would consider him worth $7500.00.

Q. 12. Assuming the plaintiffs' chesnut colt by Star Shoot, dam Blue Danube, was one year old the spring of 1910, that they commenced to break him on the 12th day of August; that after being broken he was given ordinary work up to the 8th day of September; that on the 8th day of September, he was breezed one eighth in eleven and four fifths; that thereafter he was given ordinary work in handling up to the time of his destruction by fire on November 17th, 1910, at Frankfort, Ky., that two days prior to November 17th, 1910, he was breezed one-fourth in twenty and one-fifteenth seconds, with about one hundred and thirty-five pounds up; assuming that he was, just before the time of the fire November 17th, 1910, at Frankfort, Ky., sound fifteen hands and two inches high, a
268 rangy well broken colt; a good disposition,—what in your opinion was the fair market value at the time of his destruction by fire on November 17th, 1910?

Defendant objects which objection is overruled by the Court to which ruling of the Court defendant excepts.

A. Well, just in a general way he is one of the choicest in America.

COURT: Just answer the question.

A. I think the colt was worth $8,000.00.

Q. 13. Doctor, do you know anything of the breeding and value of the Miller, Lady Beth filly?

A. Yes.

Q. 14. Well, assuming that the plaintiffs' bay filly by Miller, dam Lady Beth, was one year old in the spring of 1910; that they commenced to break her the latter part of August, 1910; that after being broken she was given ordinary work up to October 1910; that in October 1910, she was breezed one fourth in twenty-two and two fifths seconds; that after that she was given ordinary work up to the time of her destruction at Frankfort, Ky., on November 17th, 1910; that she was, just before the time of her destruction by fire on November 17th, 1910, at Frankfort, sound, of good size, of good action, and well broken and of good disposition,—what in your opinion was her fair market value at the time of her destruction by fire on November 17th, 1910?

Defendant objects, which objection is overruled by the Court, to this ruling of the Court defendant excepts.

A. $1500.00.

Q. 15. Would you know anything of the breeding of the filly by Miller, Lady Premier?

A. Yes sir.

Q. 16. Assuming that the plaintiffs' bay filly by Miller, dam Lady

Premier, was one year old in the spring of 1910; that they
269 commenced to break her the latter part of August, 1910; that after being broken she was given ordinary work up to the middle of October, 1910; that in October 1910, she was breezed one-fourth in twenty-four seconds; that thereafter she was given ordinary work in handling up to the time of the injury complained of on November 17th, 1910, at Frankfort, Ky.; and assuming that she was, just before and at the time of the injury complained of by fire on November 17th, 1910, at Frankfort, Ky., sound, of good size, good action, well broken, and of good disposition,—what in your opinion was her fair market value just before and at the time of the injury complained of on the 17th day of November, 1910?

A. I think she was worth about $600.00.

Q. 17. Now, Doctor, assuming that the same bay filly by Miller, dam, Lady Premier, on November 17th, 1910, at the time of the fire at Frankfort, Ky., with seven other horses in an Arms Palace Horse car, attached and being part of a freight train, on that night about 11:30, or twelve o'clock, the defendant's engine and other cars slid or bumped into this Arms Palace car, containing these horses, with such force that the shock or jar put out one of the lanterns hanging there and supported by guy wires, and knocked one of the attendants from off a sack of oats and wakened the other attendant who was lying asleep there, and broke part of the frame of one of the lanterns off and threw the oil part of that lantern forward towards the front end of the car and set the saw dust and hay on fire, and before the fire could be controlled three horses in that car were so badly burned that they had to be killed; that there was great excitement among the horses, very great noise of neighing of the horses; that the bay filly by Miller, dam Lady Premier, was burned on the nose and back, while all of the horses in car, except three, that were afterwards killed, were pulled and pushed from the car; that this filly,
270 dam Lady Premier, was after two or three weeks put in training again; that she was from the time of the fire foolish about the head; that her disposition, since the fire, has been apparently changed; that she has been, though not started in a race, very nervous, and that up to the present time jerks and exhibits this nervousness; that the last time she was on the track, ten or twelve days ago, ran out of the track, getting beyond the control of the rider,—assuming these things, what in your opinion was the fair market value of her, after the fire, just referred to, on November 17th, 1910?

Defendant objects, which objection is sustained by the Court, to this ruling of the Court plaintiffs except.

Q. 18. Doctor, in your opinion, as an expert, do you think you are qualified to give an opinion as an expert, now as a horseman and physician, as to the effect that such an experience these animals went through would have upon that animal thereafter?

A. Well, I have never had enough experience as an expert you mean so to state what it would be in a perfect animal; I only know that a shock or anything of that kind given to animals or thoroughbred horses with a highly nervous organization, generally injured

them in every way; their dispositions are changed; foolish when they come in the presence of noise or any unusual sounds, adding to the shock upon their nervous systems; they show more excitability of the nervous system than they ever did before such a shock had occurred.

Defendant objects to the answer, which objection is overruled by the Court, to this ruling of the Court defendant excepts.

Q. 19. In your opinion as a horseman, to what extent would that sort of an experience affect the value of a horse after that experience?

Defendant objects which objection is overruled by the Court, to this ruling of the Court defendant excepts.

271 A. It would affect the racing value of that horse, in my judgment, at least seventy-five per cent, the racing value.

Defendant objects.

COURT: If he means to confine that to the market value, let him state it.

Q. 20. How would that affect the market value?

A. If these facts were fully known, I would still say it would affect the market value at least seventy-five per cent.

Q. 21. Would you know if you were told about the filly by Ethelbert, Miss Wicks, would you know the breeding of that filly?

A. Yes sir.

Q. 21. Assuming that the plaintiffs' brown filly, by Ethelbert, dam Miss Wicks, was one year old in the spring of 1910; that they commenced breaking her the latter part of August, 1910; that after being broken she was given ordinary work up to October, 1910; that in October 1910 she was breezed one-fourth in twenty-three and three fifths; that thereafter she was given ordinary work and handled up to the time of the injury complained of by fire on November 17th, 1910, at Frankfort, Ky., and assuming that she was, just before and at the time of the injury complained of by fire, on November 17th, 1910, at Frankfort, Ky., sound, good size, with good action, well broken and of good disposition,—what in your opinion was her fair market value just before and at the time of the injury complained of by fire on November 17th, 1910?

Defendant objects, which objecton is overruled by the Court, to this ruling of the Court defendant excepts.

A. I think that filly is worth $1,000.00.

Q. 23. Would the expert opinion with reference to the depreciation in value by reason of the things just stated to you in the hypothetical question with reference to the Ethelbert—Miss Wicks filly, and the matters you have stated before, would it affect a colt similar to this one in the same manner?

272 A. Yes, in my judgment, too.

Q. 24. How much would it affect the fair market value of this colt—what would this colt be depreciated at?

A. I would say this filly after such an accident as that, in my

judgment, would only be fit for a brood mare; I think her depreciation would be seventy-five per cent depreciation.

Q. 25. Would you know about a colt if I gave you the sire Jack Point, dam Lady Vincent, would you know about the breeding of that colt?

A. Yes sir.

Q. 26. Assuming that the plaintiffs' black colt by Jack Point, dam Lady Vincent, was one year old in the spring of 1910; that they commenced to work him in the latter part of August; that after being broken he was given ordinary work to November, 1910; that in October, 1910, he was breezed one-fourth in twenty-three and three-fifths seconds; that thereafter he was given ordinary work in handling up to the time of the injury complained of by fire on November 17th, 1910, at Frankfort, Ky., assuming that he was, just before and at the time of the injury complained of on November 17th, 1910, sound, of good size, well broken, good action, good disposition,—what in your opinion was his fair market value just before and at the time of the injury complained of by fire November 17th, 1910?

Defendant objects which objection is overruled by the Court, to this ruling of the Court defendant excepts.

A. About $750.00.

Q. 27. Would the experience passed through by that colt have the same depreciation and effect upon the fair market value, that you have given to the others?

Defendant objects, which objection is sustained by the Court, to this ruling of the Court plaintiffs except.

273 Q. 28. Doctor, assuming that this colt by Jack Point, dam Lady Vincent, passed through the same experience at Frankfort that has been detailed to you with reference to the other colts, that this colt, Jack Point, dam Lady Vincent was burned slightly about the foretop and mane; that this colt by Jack Point, dam Lady Vincent, was, after a short time put in training again, that he exhibited plenty of speed, but was nervous in his work; that he did no good in racing; that in racing he would not get up to his work in training; what in your opinion, assuming all these things was the fair market value just after the fire above referred to November 17th, 1910?

Defendant objects which objection is overruled by the Court, to this ruling of the Court defendant excepts.

A I think about $150.00 or $200.00.

Q. 29. Would you know the breeding of the Star-Shoot, Amy Davenport colt?

A. Yes, I have heard that pedigree.

Q. 30. Assuming that the plaintiffs' bay colt by Star Shoot dam Amy Davenport, was one year old in the spring of 1910; that they commenced to break him the latter part of August, 1910; that after being broken he was given ordinary work up to October, 1910; that

in October, 1900 he was breezed a quarter in twenty-two and two-fifths seconds; that thereafter he was given ordinary work in handling up to the time complained of by fire, on November 17th, 1910, at Frankfort, Ky.,—assuming that he was, just before and at the time of the injury complained of by fire on November 17, 1910, at Frankfort, Ky., sound, of good size, stout, good action, well broken and of good disposition,—what in your opinion was his fair market value just before and at the time of the injury complained of by fire, November 17th, 1910?

Defendant objects, which objection is overruled by the Court; to this ruling of the Court defendant excepts.

A. I think $2,500.00, would be a fair price for him.

274 Q. 31. What do you mean by fair price?

A. I mean the fair market value.

Q. 32. Taking that same colt and assuming that that Star Shoot, Amy Davenport colt on November 17th, 1910, at the time of the fire in Frankfort, Ky., had his foretop and hair about his head slightly scorched; that this colt by Star Shoot, dam Amy Davenport, was, after a short time put in training; that he was fast in training but nervous in his work; that he did no good in racing, being apparently afraid of a crowd, and didn't get up to his speed in training,—assuming all these things, what in your opinion was his fair market value just after the fire above referred to on November 17th, 1910?

Defendant objects which objection is overruled by the Court, to this ruling of the Court defendant excepts.

A. I think he would have a market value of $1,000, at the time you refer to.

Q. 33. After the fire?

A. Yes, sir.

COURT: If your opinion is based upon just after the fire, I sustain the objection.

Q. 34. I will put that in a question; at such reasonable time after the fire as the extent of the physical injury could be ascertained?

A. I believe he had a market value of $1,000.00.

Cross-examination:

Q. 1. Doctor, your profession was that of medicine?

275 A. Yes sir.

Q. 2. And you followed that?

A. Yes sir.

Q. 3. Your incidental amusement was that of thoroughbred horses was it?

A. Outside incidental amusement.

Q. 4. You took such an interest in it as a gentleman of intelligence and citizen in this part of the country does, and especially in the County of Woodford, where you have so many thoroughbred interests?

A. I took an interest that would make it as remunerative as I could.

Q. 5. When did you commence breeding?

A. I bought the first thoroughbred in 1886 that I owned; I didn't commence breeding until a year or two after that.

Q. 6. Since that time your attention has been directed solely or considerably to the values of thoroughbreds?

A. Considerably so; I studied their values, I could see every sale, and I took an active interest in it.

Q. 7. Did you follow all the sales such as were printed — the Daily Sales in the Chicago Racing Form, which gives I believe all the sale-,—did you take sufficient interest to follow all the sales over the country?

A. Every one, I made a point of it to know the results of the sales.

Q. 8. Did you make it a point to know all the sales?

A. If it was published, I did.

Q. 9. Then you would know all the sales that were published, say in the Chicago Racing Form?

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A. I think so.

Q. 10. Did you take that paper?

A. No sir.

Q. 11. Is there any other newspaper that makes it a practice of publishing all the sales and the prices at those sales?

A. New York Telegraph.

Q. 12. Did you take that paper?

A. Yes sir.

Q. 13. How long have you been taking that?

A. Off and on, say eight or ten years, I don't remember exactly, but we get them in the different papers.

Q. 14. Coming down specifically, did you notice the sale that Mr. Catesby Woodford had at Saratoga, in 1910, August?

A. Yes, I saw an account of that sale.

Q. 15. Do you recall that a chestnut colt by Star Shoot, out of Last Cherry, was sold at that sale?

A. It was sold at that sale.

Q. 16. Do you recall the price that it brought?

A. Not specifically; I didn't commit to memory all those things.

Q. 17. If you were informed that the price of that colt on the 11th day of August, 1910, at a public sale made in Saratoga, was only $1,600.00, would that affect your judgment as to the value of that colt which had been handled there about forty days and had no record, of course it was a yearling and was breezed and twenty-three and three-fifths a quarter?

A. Yes sir.

Q. 18. That the colt was sound, of good size, good disposition, and broken, that it had been broken at the time the sale was made, and sold for $1,600.00——

A. You say he had been broken and tried out before that Saratoga sale?

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Q. 19. No, I said it had been handled; some of the wit-

nesses testified that the colt had been handled, up there before the sale.

COURT: I think they said halter broken.

A. No, it would not affect me.

Q. 19. What was the condition of the market, thoroughbred market in the United States generally in November, 1910, on the 17th of November?

A. I would like to ask the question if that was not right after the election of the Governor in New York?

Q. 20. I don't recollect the exact date.

A. If it was I want to say yes; that just after the election of Governor,—of Dix for the Governorship of New York, there was quite a revival in stock, that was very general through the country, upon the part of racing people toward racing stock.

Q. 21. That raised expectations that were not realized?

A. That is what he did; never was realized.

Q. 22. Is it not a fact and don't you know it to be a fact that the leading breeding establishments, such as Keene, Haggin and others of that sort have been broken up and dispersed? Many taken away from here?

A. O, no.

278 Q. 23. A number of them?

A. (No answer.)

Q. 24. Wasn't that the outside effect of the values of thoroughbreds?

A. It was the effect of valuing thoroughbreds that made them take them away from here. I don't think any of those men taking the horses away affected the value, it was because the country conditions were such as made these men think their values were affected, but I don't think the mere fact of these men getting the horses from America depressed the values then.

Q. 25. But the cause of the removal of those horses from America was generally patent throughout the country?

A. Yes sir.

Q. 26. And that cause generally affected the value of thoroughbreds didn't it?

A. Undoubtedly.

Q. 27. It had been very seriously depressed hadn't it?

A. Very.

Q. 28. Was there any very serious increase of prices from any cause after that?

A. No, there has been no very great increase of prices since the passage of the Hughes Agnew bill.

Q. 29. Let us take this Danube colt, by Star Shoot, your valuation of that one is what?

A. $8,000.00.

Q. 30. What do you base that upon and the other one, and what elements do you consider at the arrival of the price on either one of those colts, the Last Cherry or Danube colt?

A. In the first place they are sired by Star Shoot, the most popular and most valuable horse in America.

279 Q. 31. You being a judge, what would you think Keene would say to that?

Plaintiffs object.

A. He is the most popular sire in America, his dam is a producing dam; then his soundness and individuality and kind disposition have further increased his value. These colts were entered in two one thousand dollar stakes.

Q. 32. Do you know that personally?

A. No sir.

Q. 33. You have no right to testify that.

A. Well, it was a knowledge of these engagements which made me have a knowledge of their value.

Q. 34. Well, but you don't know all that?

A. They were determining factors with me in putting an estimate on the value of the colt and his probable ability, on putting the value on this colt.

Q. 35. That was not included in the hypothetical question put to you, the fact that he was entered in a stake—I object to the Doctor's going into that.

COURT: I think as you have asked him upon what he based that, I think he has a right to say it.

Defendant objects to the ruling of the Court.

Q. 36. As an intelligent man, as I know you to be, and all who know you—you take into consideration the elements of the blood combinations of that horse?

A. I would not consider that colt worth money simply because he was by Star Shoot out of Blue Danube, without there would be other correlative effects I would have to consider.

Q. 37. Suppose he had been by Miller out of Miss Wicks, would he have been as valuable?

A. No sir.

Q. 38. Why not?

280 A. Because Miller has never proved himself a successful sire; Star Shoot has; in other words, his success as the sire of winning race horses, his prestige.

Q. 39. Therefore you would take into consideration very largely, assuming that the blood of the sire, is that not a valuable race horse?

A. I give it just value one point; that is the point of the sire's pedigree.

Q. 40. Could you estimate what that would be?

A. In this colt I would say it was largely in his favor, it couldn't be fixed in dollars and cents; I would have to take the dam and his individuality before you did the products of them, know what breeding he had to be a money winner.

Q. 41. Then the product of colts produced of any horse or sire or the product of any particular dam, the market value of those depends largely upon the public estimation of values on those bloods, doesn't it?

A. Yes sir, that does not form the entire estimate of public opinion; that is not made up purely upon the blood line of the colt.

Q. 42. Suppose you take a colt that is put up for sale, that has not been tried at all, never breezed, and that is bid on by bidders at that sale,—what are the elements that control them in paying prices?

A. First would be the sire, what it is out of; look at his dam; what has that dam produced; then what the sire has done, what has that dam produced; then the buyer is there and he takes in individuality and the personality of the colt.

Q. 43. And the public opinion is formed upon these elements?

A. Yes sir.

281 Q. 44. But where there is a number of sales of that sort then the aggregate of the sale forms the public opinion?

A. The aggregate sales form the aggregate of public opinions, yes sir.

Q. 45. Have you ever taken any particular interest in the speed of animals on the track?

A. Yes sir.

Q. 46. How is a quarter of a mile in twenty-three and three-fifths seconds?

A. With one hundred and thirty pounds up is extra high class work.

Q. 47. Was anything said to you here about one hundred and thirty pounds up?

A. Yes.

Q. 48. I would like to ask you if one hundred and thirty pounds was mentioned in that question as being on the colt when he made the trial?

A. That is the question.

Q. 49. I ask you whether either that one hundred and thirty pounds on one and one hundred and thirty-five pounds on the other, is that a great performance?

A. That is a very high creditable performance.

Q. 50. Is it a great performance is my question?

A. I say it is an extra creditable performance.

Q. 51. Is it an extraordinary performance?

A. Yes sir, it is a performance that is not reached every day by any colt carrying that much weight, it takes an extra colt carrying that much weight.

Q. 52. If a yearling on the same track runs a quarter in twenty-two and a fraction, what would you think of that?

A. With the same weight?

Q. 53. Yes, one hundred and thirty pounds?

282 A. I don't believe any colt has run a quarter.

Q. 54. I didn't ask you what you believed——

A. I say if a colt run a quarter with one hundred and thirty pounds, he would be a phenomenal colt.

Q. 55. I want you to answer the question here,—then that would be a phenomenal colt?

A. Yes sir.

Q. 56. But the one that runs it in twenty-three and three-fifths would not be a phenomenal colt?
A. He would not be a phenomenal but extra good.

CAMDEN, J. N., Who having been first duly sworn testified on behalf of the plaintiffs as follows:
Q. 1. Where do you live?
A. Woodford County.
Q. 2. How long have you lived in Woodford County?
A. About twenty-two or twenty-three years.
Q. 3. Are you engaged in the thoroughbred horse breeding business?
A. Yes, I have been.
Q. 4. Are you acquainted with pedigrees and market values of thoroughbred horses?
A. Well, I think I ought to be; I don't know how good my judgment is.
Q. 5. If I speak of a colt, Star Shoot, Last Cherry, would you understand the breeding of that colt?
A. Yes, that conveys something to me.
Q. 6. Well, assuming that the plaintiffs, Woodford & Ireland's bay Star Shoot, dam Last Cherry, was one year old in the
283 spring of 1910; that they commenced to break him the 12th day of August, 1910; that after being broken he was given ordinary work up to the 8th day of September, 1910; that on the 8th day of September, 1910, he was breezed one-eighth in eleven and four-fifths; that thereafter he was given ordinary work in handling up to the time of his destruction by fire on November 17th, 1910, at Frankfort, Ky., that two days prior thereto, on November 15th, 1910, he was breezed one quarter in twenty-four and two fifths seconds, with about one hundred and thirty pounds up; that he was entered in seventy-five one thousand dollars' worth of stakes; and assuming that he was, just before and at the time of his destruction by fire in November, 1910, at Frankfort, Ky., sound, good action, well broken, of good disposition,—what in your opinion was his fair market value at the time of his destruction on November 17th, 1910?

Defendant objects, which objection is overruled by the Court, to this ruling of the Court defendant excepts.

A. Well, I should think he would be worth $5,000.00, or $6,000.00.
Q. 7. The Star Shoot—Blue Danube colt—assuming that the plaintiffs' chestnut colt by Star Shoot, dam Blue Danube, was one year old in the spring of 1910; that they commenced breaking him on the 12th day of August, 1910; that after being broken, he was given ordinary work up to the 8th day of September, 1910; that on the 8th day of September, 1910, he was breezed one-eighth in eleven and four-fifths seconds; that thereafter he was given ordinary handling up to the time of his destruction by fire on November 17th, 1910, at Frankfort, Ky.; that two days prior thereto, on No-

vember 15th, 1910, he was breezed a quarter in twenty-four and two fifths seconds; that about thirteen days after that he was entered into seventy-five or one thousand dollars' worth of stakes; and assuming that just before his destruction by fire, in Frankfort, Ky., that he was sound, fifteen hands two inches high, rangy, good disposition,—what in your opinion was his fair market value on November 17th, 1910?

284 Defendant objects; which objection is overruled by the Court, to this ruling of the Court defendant excepts.

A. From $8,000.00, to $10,000.00.

Q. 8. Would you know the breeding of a horse if I mention the sire and dam, Star Shoot, Amy Davenport colt?

A. Yes sir.

Q. 9. Now assuming that the plaintiffs' bay colt by Star Shoot, dam Amy Davenport, was one year old the spring of 1910, and that they commenced breaking him the latter part of August, 1910; that after being broken he was given ordinary work up to October 1910; that in October, 1910, he was breezed a quarter in twenty-three and two-fifths seconds; that thereafter he was given ordinary work in handling up to the time of the injury complained of by fire on November 17th, 1910; and assuming that he was just before and at the time of the injury complained of by fire on November 17th, 1910, at Frankfort, Ky., sound, of good size, stout, good action, well broken, and of good disposition,—what in your opinion was the fair market value just before and at the time of the injury complained of at Frankfort, Ky., on November 17th, 1910?

Defendant objects, which objection is overruled by the Court, to this ruling of the Court defendant excepts.

A. I think that colt would be worth from $5,000.00, to $7,000.00.

Cross-examination.

Q. 1. In forming your opinion as to the value of the colt, under these hypothetical questions addressed to you, what are the elements which you consider as entering into the estimate?

A. Well, I would say first their winning capacity, and their ability to win the stake races that they had been engaged, and their
285 breeding; Star Shoot, if I recall right, was the second stallion on the winning list in 1910, and on the dam side this Blue Danube mare belongs to the best racing family in America. Well, it is a matter of pedigree, individuality, winning capacity and good management.

Q. 2. A yearling of course has no record.

A. No.

Q. 3. One of these had been breezed in twenty-four and three-fifths seconds a quarter, and the other in twenty-three and two fifths seconds a quarter, that is not an extraordinary performance is it?

A. No, it is simply good enough for you to go on and put your colts in the stakes.

Q. 4. That is to lead a man on to train?

A. Yes sir.

Q. 5. In other words, to make a man have good expectations?

A. Yes sir.

Q. 6. It is sufficiently good for a man to feel he has good prospects and a good colt?

A. That is the extent—that is really what a man wants to know with a yearling.

Q. 7. That he has, he thinks he has an animal sufficient to justify him to go to the expense of training?

A. That he has a high class horse.

Q. 8. What value has pedigree in forming your opinion as to the value of an animal, say a yearling?

A. Pretty nearly everything.

Q. 9. Suppose there were a number of sales over the country of stock of any good sire and a certain specified dam, put up as
286 yearlings, and sold and a man comes and bids on an animal of that sort, what are the elements that enter upon his calculations, upon which he bases?

A. I think every man looks a great deal first at the horse's pedigree and breeding and then he looks over the horse to see if he has individuality that comes up to his lineage.

Q. 10. But is it not true that the elements which chiefly forms the opinion of the bidder at a public sale are those of blood combinations, the blood that flows in the veins of that particular animal as well as with those in health?

A. A true racing combination, as the man understands it.

Q. 11. Those are the elements that do it?

A. Yes sir.

BARBEE, JOHN, Who having been first duly sworn, testified on behalf of the Plaintiffs as follows:

Q. 1. What is your name?

A. John Barbee.

Q. 2. Where do you live?

A. In the country, on the Ironworks pike.

Q. 3. What is your business?

A. Horse business.

Q. 4. How long have you been in the horse business, or connected with it?

A. About twenty years past.

Q. 5. Are you acquainted with the market values and pedigrees of race horses?

A. Fairly well.

Q. 6. From what period of time have you been so acquainted?

287 A. About twenty years I guess.

Q. 7. And were so acquainted in November, 1910?

A. Yes sir.

Q. 8. Did you know a Star Shoot-Last Cherry colt, belonging to Woodford & Ireland?

A. Yes sir.

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Q. 9. In your opinion, having seen that colt—first tell us what you saw of that colt?

A. Well, I saw the colt a number of times at Mr. Woodford's farm before he was shipped, in his yearling form, for sale. I saw him sold in his yearling form, and I saw him at work after being sold.

Q. 10. Now from what you saw of that colt, what was his fair market value, after the 17th day of November, 1910?

Defendant objects.

Q. 11. With what you knew of this colt, and assuming that they commenced to break him on the 12th day of August, 1910; that after being broken he was given ordinary work up to the 8th day of September, 1910; that on the 8th day of September, 1910, he was breezed one-eighth in eleven and four-fifths seconds; that thereafter he was given ordinary work in handling up to the time of his destruction by fire on November 17th, 1910, at Frankfort, Ky., that two days prior thereto, on November 15th, 1910, he was breezed a quarter in twenty-four and two fifths seconds, with about one hundred and thirty pounds up; that he was entered into seventy-five one thousand dollars' worth of stakes; and assuming that just before and at the time of his destruction by fire on November 17th, 1910, at Frankfort, Ky., he was sound, of good action, well broken, rangy, good disposition,—what in your opinion was the fair market value at the time of his destruction by fire on the 17th day of November, 1910?

288 Defendant objects which objection is overruled by the Court, to this ruling of the Court, defendant excepts.

A. Why I think somewhere around $7,000.00 perhaps $7500.00.

Q. 12. Did you see or know a Star Shoot-Blue Danube colt, belonging to Woodford & Ireland?

A. Yes sir, just the same as the other one.

Q. 13. Well, assuming the same history for the Star Shoot, Blue Danube colt, what would you say was the fair market value of that colt on the 17th day of November, 1910, at the time of his destruction by fire?

Defendant objects which objection is overruled by the Court, to this ruling of the Court defendants excepts.

A. I would say about $6500.00, I judge.

Q. 14. Did you know a Miller, Lady Beth filly, belonging to Woodford & Ireland?

A. I cannot recall that filly.

Q. 15. Did you know a Star Shoot, Amy Davenport colt?

A. Yes sir.

Q. 16. What did you know of that colt?

A. Well, I saw that colt, and I think I saw that colt sold in the same sale, but I never saw him at work.

Q. 17. Well, now assuming that the plaintiff's bay colt by Star Shoot, dam Amy Davenport, was one year old in the spring of 1910;

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that they commenced breaking him the latter part of August, 1910, that after being broken he was given ordinary work up to the middle of October, 1910; that he was breezed one-fourth in twenty-three and one-half seconds; and assuming that he was just before and at the time of the injury complained of, on November 17th, 1910, sound, of good size, stout, good action, well broken, of good disposition,—what in your opinion was his fair market value just before and at the time of the injury complained of on November 17,
289 1910?

A. I would say $2500.00.

Cross-examination:

Q. 1. I suppose you are aware that the colt was sold on the 11th day of August, 1910, at the Saratoga sales of Mr. Catesby Woodford,—do you know the price that the colt realized?

A. I think $1600.00, I am not sure.

Q. 2. If you were told that you were mistaken in that, and that the price was $600.00——

A. Which colt do you mean?

Q. 3. O, those two—would that have any effect upon your——

A. No, I was judging my value from the work they done in the field, and then I thought that was their sale up there.

Q. 4. Do you recall what the work was done out there?

A. Twenty-three and one-half, I heard was the work.

Q. 5. The Amy Davenport colt?

A. Yes sir.

Q. 6. Did you see the colt after he was brought here?

A. Yes, he is at my place now.

Q. 7. He is at your place now?

A. Yes sir.

Q. 8. I mean before he was started off down to Mexico?

A. No.

Q. 9. He was sent to Mexico, wasn't he?

A. I think so. I think I have heard so.

COUNSEL FOR PLAINTIFFS: I did not know that was the one at his place—how long have you had that colt at that place?

A. He has been there probably three months.

COUNSEL FOR PLAINTIFFS: Did you know his disposition before the time of the fire?

290 A. No sir.

COUNSEL FOR PLAINTIFFS: What is the disposition of that colt now at that place?

A. This colt is only turned out; you know I can't state much about his disposition; he just runs out: I am feeding and taking care of him.

COUNSEL FOR PLAINTIFFS: Assuming that they bay colt by Star Shoot, dam, Amy Davenport, on November 17th, 1910, at the time of the fire at Frankfort, Ky., was, with seven other horses, in an Arms Palace horse car, attached and being part of a freight train, on that night about eleven thirty or twelve o'clock, and defendant's engine and other cars hit or bumped into this Arms Palace car

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containing these horses, with such force that the shock or jerk put out one of the lanterns hanging there and supported by guy wires, knocking one of the attendants there off a sack of oats and awakened the other attendant, who was lying on the hay, and broke part of the frame of one of the lanterns off and threw the oil part of that lantern forward towards the front end of the car, and set the saw dust and hay on fire and before the fire could be controlled, three horses in the car were so badly burned that they had to be killed; that there was great excitement among the horses there and a great noise of the neighing of the horses; that that bay horse by Star Shoot, out of Amy Davenport, had his foretop and hair slightly singed; that this colt was after a short time put in training; that he was fast in training, but nervous in his work; that he did no good in training, and apparently was afraid of a crowd, and did not get up to his speed in training,—and assuming all these things and when you yourself know about this colt, what in your opinion was the fair market value of that colt at a reasonable length of time after that fire down there, and do you know what the value was?

291 Defendant objects which objection is overruled by the Court, to which ruling of the Court, the defendant excepts.

A. Well, I think he was practically worthless after the fire.

COUNSEL FOR PLAINTIFFS: And you count him so now?

A. Yes sir.

COUNSEL FOR PLAINTIFFS: Well, why?

A. Well, I don't think the horse would race; that is my impression; horses that have been through fires and an accident of that kind won't race, and is probably not worth any more than a common horse.

Q. 10. Has that horse been entered in any race so far as you know?

A. Not so far as I know.

Q. 11. Don't you know he has been entered in a number of races?

A. No sir.

Q. 12. That he was second in one race and third in another?

A. No sir; in fact I never heard the name of the colt.

Q. 13. Did you know of his ever having been entered in any race?

A. No sir.

COUNSEL FOR DEFENDANT: I have made a mistake; I withdraw that.

Q. 14. You don't know even that he had been entered in any race?

A. No sir.

Q. 15. You think he practically is of no value at all?

A. No more than an ordinary horse.

Q. 16. As to breeding?

A. Why pretty good breeding, Star Shoot, out of a good mare.

Q. 17. How is Amy Davenport?

A. I don't know her breeding value; I know she is a nice brood mare.

LOSE IN CENTER

292 Q. 18. Upon what did you place the valuation that you *sage?*

A. Upon the work he did upon the track as a yearling.

Q. 19. Do you recollect what that was?

A. Twenty-three and a half.

Q. 20. Breezed on one occasion?

A. Yes sir.

293 Q. 21. Is it customary to put so high a valuation upon a colt equally as well bred as that, simply because he had run on one breezing twenty-three and a half?

A. Yes, I have refused more than that for one that couldn't run any faster.

Q. 22. We are speaking of values now, as of the night of November 17, 1910,—what was the condition of the thoroughbred market at that time?

A. Well, the market for the last two or three years has been bad.

Q. 23. Now you still think in view of the condition of the market at that time, that he was worth $2,500.00, as of that date?

A. Yes sir.

MADDEN, JOHN E., Who having been first duly sworn testified on behalf of the plaintiffs as follows:

Q. 1. What is your place of residence?

A. I breed horses in Fayette County and have been here for fifteen years.

Q. 2. How long have you been in the breeding and training horse business?

A. For fifteen years, about.

Q. 3. Are you acquainted and have you been acquainted during the fifteen years, with pedigrees and market values of horses in this country?

A. I was forced to do that to get a good line on my business; I had to study that.

Q. 4. Have you been and are you now acquainted with those matters, about which I have just asked you?

294 A. Yes sir.

Q. 5. Would you know the breeding of a colt were I to say he was by Star Shoot out of Last Cherry?

A. Yes sir.

Q. 6. Do you know a Star Shoot—Last Cherry colt, owned by Woodford & Ireland in 1910?

A. Yes sir.

Q. 7. Had you seen the colt?

A. Yes sir.

Q. 8. When did you see the colt?

A. In May, on the farm of Mr. Woodford, near Paris, in 1910.

Q. 9. Then a weanling?

A. No sir, they were then being prepared to take to the sale in New York. To make it clear, I have every year tried to get a week or ten days off and go down to look at all the yearlings,—who would offer their yearlings for sale; I wanted to see them before they

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got on the market, which gives me a better idea to take the good from the bad, and that is why I would go down to Woodford's; I could see them in the rough and then know how they would look on that day; that is the way I went down to look at the yearlings at Mr. Woodford's and Mr. Zeke Clay's, or whoever had them for sale.

Q. 10. Did you see that Star Shoot colt after that time?

A. Yes at Saratoga.

Q. 11. Did you see him after that?

A. No.

Q. 12. Assuming that Woodford & Ireland's bay colt by Star Shoot, dam Last Cherry, was one year old in the spring of 1910 that they commenced to work him on the 12th day of August, 1910; that after being broken he was given ordinary work up to the 8th day of September, 1910; that on the 8th day of September, 1910, he was breezed one-eighth in eleven and four-fifths
295 seconds that thereafter he was given ordinary work in handling up to the time of his destruction by fire on the 17th day of November, 1910, at Frankfort, Ky.; that two days prior thereto, on November 15th, 1910, he was breezed one-quarter in twenty-four and two fifths seconds; with about one hundred and thirty pounds up; that he was entered in a seventy-five one thousand dollars' worth of stakes,—and assuming that he was just before and at the time of his destruction by fire upon the 17th day of November, 1910, at Frankfort, Ky., sound, of good disposition, well broken, good action,—what in your opinion was his fair market value at the time of his destruction November 17th, 1910?

Defendant objects which objection is overruled by the Court, to this ruling of the Court, defendant excepts.

A. $10,000.00.

Q. 13. Did you know the Star Shoot, Blue Danube colt, belonging to Woodford & Ireland, in 1910?

A. Yes sir.

Q. 14. What knowledge had you of that colt?

A. In looking over all the yearlings that Mr. Woodford and Mr. Clay had, I picked out just three that I made up my mind——

Defendant objects, which objection is sustained by the Court.

Q. 15. Did you see that Star Shoot?

A. You know I am not here from choice; they forced me in here.

Q. 16. Did you know the Star Shoot—Blue Danube colt?

A. I did, well.

Q. 17. Where did you see it?

A. Mr. Woodford's in May and at Saratoga for a few days before he was sold; guess I would look at him every day; I looked at him in particular; I was much interested in him for I earned $72,000.00, with his half brother.

296 COURT: That statement will be withdrawn from your consideration, gentlemen of the jury.

Q. 18. Assuming that plaintiffs' colt by Star Shoot, dam Blue

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Danube, was one year old in the spring of 1910; that they commenced to work him on the 12th day of August, 1910; that after being broken he was given ordinary work up to the 8th day of September, that on the 8th day of September, 1910, he was breezed one-eighth in eleven and four-fifths seconds; that thereafter he was given ordinary handling up to the time of his destruction by fire on the 17th day of November, 1910, at Frankfort, Ky.; that two days prior thereto, on November 15th, 1910, he was breezed one quarter in twenty-four and two fifths, with about one hundred and thirty-five pounds up; that he was entered into seventy-five one thousand dollars' worth of stakes; and assuming that just prior to his destruction by fire in Frankfort, Ky., on the 17th day of November, 1910, that he was fifteen hands two inches high, rangy, of good disposition,—what in your opinion was his fair market value on November 17th, 1910?

A. $10,000.00.

Cross-examination:

Q. 1. Were you present at the Saratoga sale at which these colts were sold?

A. Yes sir.

Q. 2. Did you bid on these two colts?

A. No.

Q. 3. Do you remember what they were sold for?

A. They were sold in the neighborhood from between twelve fifteen and sixteen hundred dollars, something in between that.

Q. 4. Do you know Mr. Woodford?

A. Yes.

297 Q. 5. What connection has he with the race track here?

A. As a breeder and President.

Q. 6. What do you call this track out here?

A. You have been there as well as I have, I have seen you bet as many times as I have.

Q. 7. What is the name of it?

A. Kentucky Association.

Q. 8. Then he is President of this thoroughbred racing track at Lexington?

A. Yes.

Q. 9. Do you know Mr. Johnson Camden?

A. Yes sir.

Q. 10. What connection has he, if any, with that?

A. None whatever, except perhaps a stockholder.

Q. 11. He is one of the members of the Kentucky Racing Commission?

A. That has nothing to do with any race track.

Q. 12. He is a member of the Kentucky Racing Commission?

A. I understand that he is.

Redirect examination.

Q. 13. Has the fact that Mr. Catesby Woodford is President of the Kentucky Racing Association anything to do with what you testified here?

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Defendant objects, which objection is sustained by the Court, to this ruling of the Court plaintiffs except.

At this point the plaintiffs desired offered to put further upon the witness stand Milton Young, of Lexington, Ky.; George H. Whitney, of Lexington, Ky.; Si Hughes of Lexington, Ky.; R. L. Baker, of Lexington, Ky.; A. A. Baker, of Lexington, Ky.; William
298–299 M. McDaniels, of Lexington, Ky.; W. M. Walton Lexington, Ky.; John Rodegap, of Lexington, Ky.; James B. Ross, of Lexington, Ky.; Walter Greter, of Lexington, Ky.; William L. Powers of New York City on the question of values; and the Court held that it would be accumulative evidence and declined to hear further testimony on that subject; to which ruling of the court the plaintiffs except.

It is admitted by the parties hereto that the L. & N. Railroad line runs and is operated from Lexington to West Frankfort, Ky.

The attorneys for the plaintiffs ask that the bill of lading delivered to Chester Frakes, about which Chester Frakes and John T. Ireland have testified, be produced, and asks that they be filed in evidence.

(Here follows bill of lading marked page 298.)

At this point the plaintiffs announce their case as closed, whereupon the defendant introduces in behalf of itself the following witnesses:

300 EASTIN, J. B., who having been first duly sworn testified on behalf of the defendant as follows:

1 Q. What is your name, sir?

A. J. B. Eastin.

2 Q. Where do you reside?

A. I now live at Latonia-Covington.

3 Q. Where were you living on the 17th of November, 1910?

A. Frankfort.

4 Q. What was your occupation?

A. Yard Master for the L. & N. Railroad Company.

5 Q. What were your duties as Yard Master?

A. Switching cars, placing cars from different parts of the yard.

6 Q. Do you know anything about the accident which happened and the injury to a number of horses on the night of the 17th of November, 1910?

A. Some little; not much.

7 Q. Let us know what you do know?

A. This morning that this car of horses had been delivered to Frankfort I got up and went to my business and got my orders and heard what had been left there during the night from my day's work, and there was a message there from Mr. Scott to Mr. Carr and myself to see about those horses that had been damaged there and left them in the car and have them ready for the train going South that morning; and I did not know where the horses were located at the time, so I went and told Mr. Hite the instructions I had and he told me to see if I could find the horses and locate them and he would be down and——

Plaintiff objects; which objection is sustained by the court.

301 8 Q. Just state what you saw down there.

A. Well, I went then and found the horses.

9 Q. When and where?

A. To the livery stable. Just back of the depot. And I found a couple of fellows laying there and told them my duty.

10 Q. Where did the accident happen?

A. In West Frankfort.

11 Q. Where is West Frankfort?

A. Just beyond the river from Frankfort.

12 Q. Any property of the L. & N. over there?

A. Yes, they have a yard over there.

13 Q. Did you see this car in which the fire had occurred?

A. Yes, sir.

14 Q. Where was that car standing?

A. At the stock shed.

15 Q. You don't know, of course, whether or not it was at that point when the fire began?

A. No, sir.

16 Q. Did you go into that car?
A. Yes, sir.
17 Q. Describe to the jury what you saw there?
A. I got up in the car and I seen these two horses there. I looked around and I seen where the fire had been burning the hay and damaged the car some. And there was a lamp, part of it, hanging in the top of the car, and part of it laying on the floor and this lamp was fastened to the top of the car with a wire, the bottom of it was down on the floor.
302 18 Q. Whereabouts? Do you recall—Did you pick that bottom up?
A. Yes, sir.
19 Q. Describe to the jury what condition you found it in?
A. Well, the bottom looked to me—it resembled that it had been hit, and marred just as though the glass of the lamp had been marred by the fire, the oil from it. I suppose the oil had gotten out of the lamp some way and marred this part of the lamp.
20 Q. Where did you find that?
A. It was lying, I presume, even with the door and probably a couple of feet from the edge of the car.
21 Q. From which side of the car?
A. On the North side.
22 Q. Now, outside of the door or edge of the aisle?
A. South door of the car.
23 Q. Do you mean by that the furtherest door from Lexington and the door nearest the Louisville end of the car as it stood there?
A. Yes, sir; certainly.
24 Q. What material, if any, did you find or discover in that car at that time?
A. Well, there was some old hay and straw, and each one of the horses had a blanket, I think.
25 Q. How many horses were in there when you saw them?
A. Two.
26 Q. Was anyone there when you went into that car?
A. No, sir; nobody; only myself and crew; my crew was with me.
303 27 Q. Who was with you there?
A. I don't recall now exactly. I think Mr. Rodes was one of the men; I don't recall the other brakemen.
28 Q. Was that the crew that had been with the train at the time the accident happened?
A. No, sir.
29 Q. Do you know anyone else connected with it?
A. No, sir.
30 Q. You live at Latonia, now, do you?
A. Yes, sir.

Cross-examination:

1 Q. Are you still connected with the L. & N.?
A. Yes.
2 Q. In what capacity?

A. Conductor of a freight train.

3 Q. Now, what time of the day of November 18th was it that you saw this car?

A. Well, I judge I got to the office——

4 Q. I did not ask you when you got to the office; I asked you when you saw this car?

A. I expect probably ten minutes after 6 A. M.

5 Q. Where was this car standing when you saw it?

A. At the stock shute in West Frankfort.

6 Q. Where is the stock shute in West Frankfort in reference to the L. & N. Railroad bridge that crosses the Kentucky River there?

304 A. The stock shute is on the right-hand side of the Kentucky River going South and it is about 125 feet from this end of the side track.

7 Q. I did not ask you anything about the side track; I asked you from the end of the railroad bridge.

A. I could not tell you that. I don't know exactly how long it is.

8 Q. How long were you Yard Master there?

A. About a year and half.

9 Q. And you cannot tell this jury how far that stock shute is West of the railroad bridge in the L. & N. Yards?

A. I could make a gues at it.

10 Q. Well, make a guess, if you cannot tell exactly.

A. About 600 feet, I guess.

11 Q. Don't you know that it is nearer 400 yards?

A. No, I don't know it.

12 Q. Well, isn't there—how far is the Water Tank from the West end of the railroad bridge?

A. I guess about 65 or 70; it is not over that.

13 Q. Now, how far is it from the Water Tank to the County road that crosses the railroad track West towards Louisville—from the water tank?

A. The road that crosses there at the bridge?

14 Q. I don't mean the street. I don't mean Taylor Avenue. I mean the County road down there beyond the water tank that crosses the L. & N. Railroad.

A. I guess about 325.

15 Q. What?

A. Feet.

305 16 Q. Well, that is something over 100 yards. Now, how far West of that County road is this shute—this stock shute?

A. I guess about 200 feet.

17 Q. What is there going towards Louisville on the left-hand side after you cross that County road?

A. A little residence in the corner there.

18 Q. How many feet is there for that residence?

A. About 18 or 20.

19 Q. You mean that for the house, don't you?

A. It is a very small house.

20 Q. How big is the yard that fronts on that railroad there?

A. There are two small houses there between the crossing.

21 Q. Ain't there four?

A. No, sir, not on the side next to the railroad. There are some still beyond the pike, but none between the railroad.

22 Q. Well, next to the County Road and next to the railroad beyond the County road?

A. There are two.

23 Q. Now, how much ground lay along the railroad right-of-way beyond that County road was there occupied by the yards of those two houses?

A. Well, very little.

24 Q. Well, tell it.

A. The switch stands right there by it, outside of the small houses.

25 Q. I want to know the frontage of that railroad right-of-way beyond the County road from this yard to those two houses and how to get to the cattle pen at all?

A. I don't know how far exactly. I could not say.

25 Q. Well, if you don't know, we will excuse you.

306 FISHER, WM. A., who being first duly sworn, testifies on behalf of the defendant as follows:

1 Q. Where do you live?

A. Lexington, Kentucky.

2 Q. What is your occupation?

A. Conductor on the L. & N.

3 Q. What, freight or passenger?

A. Freight.

4 Q. What was your occupation on the 17th day of November, 1910?

A. Conductor on No. 29.

5 Q. What was No. 29.

A. It was a freight train and stock.

6 Q. Was that the train on which this fire occurred?

A. Yes, sir.

7 Q. Where did you take charge of this train?

A. Lexington, at the freight yards.

8 Q. Do you recall whereabouts in the freight yards?

A. Yes, sir.

9 Q. Just go on and tell how you got charge of that car?

A. I received that car in Lexington. They always make up the freight in Lexington. We checked the cars.

10 Q. Where had that car come from?

A. From Lexington.

11 Q. Where had it come from?

A. The stock shute I presume.

12 Q. What were the contents of that car?

A. Horses.

307 13 Q. What sort of horses, do you know?

A. No, sir, I don't know.

14 Q. Where did you first see the car?

A. In the freight yards.

15 Q. Well, just tell how you came to go there?

A. It is to inspect and check the trains here, you know, to correspond with the bill and also look at the contract etc. and where the stock goes.

16 Q. What did you do that afternoon?

A. I took the train and checked the bills with the cars and also noticed the contract, how many men were in the car and everything of that kind.

17 Q. What kind of car was that?

A. An Arms Palace car.

18 Q. Where did you go?

A. Well, I checked the train and went to the freight car to get the bills and get back to the train before it departed.

19 Q. From whom did you get the bills?

A. From the Clerk at the freight office.

20 Q. Where did you get the transportation bill?

A. I got it from the colored fellow.

21 Q. Where?

A. At the yards.

22 Q. Where was he?

A. Standing on the outside of the car—one boy.

23 Q. Anyone with him?

A. Yes, sir, another negro standing there with him.

24 Q. Tell what conversation, if any, occurred between you?

308 A. I asked him for his contract and what he was riding on and he showed it and it called for two men and I asked him if that was he in the car and he said "yes," and I walked up to the door of the car and looked in to see if any more were in the car.

25 Q. Did any conversation occur between you and the man who had the bill?

A. Yes, sir.

26 Q. Tell it all?

A. He seemed to be drunk and sleepy.

27 Q. Did any conversation occur between you and him?

A. Yes, sir, I said "where is your contract and what are you riding on?" And he made some kind of insulting remark, I cannot recall what he did say.

28 Q. Tell what he said and what he did?

A. I do not recall that. I cannot say what he did say.

29 Q. Can't you recall any of it?

A. He asked me if I was the conductor and I told him "yes."

30 Q. Did he show any hesitancy in delivering up the bill?

A. No; he was a little hesitating about giving it to me; it was a few minutes before I talked him out of the bill.

31 Q. What occurred between you?

A. Not anything occurred after he gave me the bill. I did not argue with him at all.

32 Q. Before he gave you the bill,—if you remember it, if you can, and if you cannot, that is the end of it.

A. I cannot remember it.

309 33 Q. What was his condition?
A. He was certainly drunk.
34 Q. What made you think so?
A. From the way he staggered around and from his actions.
35 Q. Which one of the colored men was that?
A. The yellow complected, kinky headed fellow.
36 Q. The yellow, light-complected fellow?
A. Yes, sir.
37 Q. Did you see the other man?
A. Yes, sir; I saw him.
38 Q. Did you have any conversation with him?
A. I never said a word to him.
39 Q. Did you hear him say anything?
A. He was talking some, but I never paid any attention to him.
40 Q. Could you tell what his condition was?
A. Oh, he seemed to be drunk; both seemed to be drunk.
41 Q. Indicate how you thought he was drunk?
A. By his actions; staggering around.
42 Q. Then he delivered up his bill of transportation to you?
A. Yes, sir.
43 Q. Did you take it?
A. Yes, sir.
44 Q. And then read all the contents?
A. I examined it, but I saw how many the contract called for—2. I asked if he had any more in there and he said "no."
45 Q. What time was it when he handed you that bill?
A. I presume about 8:35 or 40.
310 46 Q. Have you any book here by which you could see?
A. I did not keep any record of that.
47 Q. Did you recall what time you left Lexington on that occasion?
A. About 9:15.
48 Q. Where did you go?
A. Went towards Louisville.
49 Q. And started from here to Louisville?
A. Yes, sir.
50 Q. Tell what occurred out of the usual, if anything?
A. Nothing unusual occurred between here and Frankfort.
51 Q. Anything unusual occur at Frankfort?
A. No more than work.
52 Q. My question was did anything unusual occur at Frankfort?
A. No, sir.
53 Q. Was there any fire in the car there?
A. I never seen any fire, at the car.
54 Q. You didn't see the fire there?
A. Not at Frankfort—at West Frankfort.
55 Q. At West Frankfort what did you see?
A. Saw the smoke coming out of the car.
56 Q. Where was it issuing from the car?
A. From the vents from the Arms Palace car.

57 Q. Where was this car at that time?
A. It was near the engine.
58 Q. Where was the engine standing—was it in motion? or standing?
A. In motion.
311 59 Q. Going in which direction?
A. Going South.
60 Q. What cars were then attached to the engine?
A. I presume about ten cars were attached to the engine.

Plaintiff- objects to the word "Presume."

61 Q. I want what you know.
A. About ten cars.
62 Q. Well, after you discovered the smoke issuing from the car, did you see any men right then and there?
A. No, sir.
63 Q. What did you do?
A. I separated the car from the other cars and run it out on the main track further away from the other train and car.
64 Q. What did you do that for?
A. To keep from burning up any of the other cars.
65 Q. How far did you draw that car?
A. 100 yards or 200.
66 Q. Was it 100 or 200.
A. About 200 yards.
67 Q. Did you go on that same track?
A. Went in the side track then with one of the men.
68 Q. When did you first see the men, or did you do anything in regard to rescuing the men?
A. Yes, it was three or four minutes after we got there before we got them out of the car.
69 Q. What did you do?
A. I yelled and hollered, also knocked on the door; also called for a coal pick before we could ever get them to hear, and the engineer was coming with the coal pick when they was coming out of the car.
312 70 Q. Where did they get out?
A. Out of the North door.
71 Q. What door did you try to get into?
A. Where the fire originated; that is, the South door.
72 Q. What did you do? What efforts did you make to get in?
A. We only hollered until we got the coal pick and after we got the coal pick we tried to break through. The hay and everything had been piled up against that car doors and of course they broke through out of the North door and opened this door, and the doors were closed from the inside and of course they would not go back there to open the doors. The smoke was so immense we had almost to tear them doors down to get near the fire at all.
73 Q. What door was that?
A. The South door. We had about five or six buckets of water.

We taken the man hole out of the engine and five or six carried water. And I presume we carried 100 buckets of water over there.

74 Q. State how many buckets you carried over there, if you can?

A. 100.

75 Q. What became of these colored men?

A. It was quite awhile before we could arouse them. They seemed to be in a stupor for about five minutes. Never even tried to do anything.

76 Q. Who got the horses out?

A. Two of the men, they went in there while the rest of us were carrying water.

77 Q. Two train men?

A. Yes, sir.

313 78 Q. Where were the negroes?

A. They finally got into the car. They were shoving the horses out as we were pulling them out.

79 Q. How many did you get out?

A. Five.

80 Q. What was the condition of those horses you got out?

A. The five we got out seemed to be in perfect condition.

81 Q. No burning on any of them?

A. Not that I seen.

82 Q. Did you look at any of them?

A. Yes, sir.

83 Q. Where did those horses go?

A. I helped them go to the stock shute.

84 Q. Where did you go after the horses were gotten out?

A. To the train dispatcher's office there in Frankfort.

85 Q. Did they go along with you?

A. No, sir.

86 Q. Who did go along with you?

A. By myself.

87 Q. Did you meet anybody coming up that way?

A. No, sir.

88 Q. Where did you go?

A. To the Union Depot there.

89 Q. What did you do there?

A. I reported the car to the dispatcher.

90 Q. Then what did you do?

A. Had my orders renewed.

314 91 Q. Well, after you reported, what did you do?

A. I waited until he gave me instructions to go.

92 Q. Then what did you do?

A. I walked back to West Frankfort.

93 Q. Did you meet anybody on the way?

A. Yes, crossing the bridge with the horses.

94 Q. How many horses?

A. I could not say whether three or four or five.

95 Q. Meet any policemen along there?

A. No.

96 Q. How long were you up at the depot?

A. I was up there at least 35 or 40 minutes.

97 Q. Then where did you go?

A. I walked back to West Frankfort.

98 Q. With reference to the East end of the bridge, where did you meet those boys, as you went back, with the horses?

A. Right at the North end.

99 Q. Had they crossed over the bridge?

A. Just crossing at the North end of the bridge.

100 Q. Did you go into that car? When you did succeed in getting in, did you go into the car itself?

A. Yes, sir.

101 Q. Where was the fire chiefly?

A. It was in the South aisle of the car, at the South door.

102 Q. In one of the stalls?

A. No, sir.

315 103 Q. Did you see any fire in the stalls?

A. No, sir; there was not any fire in the stalls.

104 Q. Did you go into any of the stalls?

A. Yes, sir.

105 Q. Which one of the stalls did you go into?

A. Well, we looked all through the stalls and looked where the fire originated. It originated right in the aisle by the South door.

106 Q. Which do you call the South door?

A. In the direction of Louisville, on the right-hand side.

107 Q. Originated near that door?

A. Yes, sir.

108 Q. Did you see any lantern at all?

A. Yes, sir; I saw the bottom of the lantern lying on the floor right in the middle of the aisle.

109 Q. Which aisle?

A. At the South door.

110 Q. Where was the other part of the lantern?

A. They had it swinging up against the roof.

111 Q. Were any of the wires down, did you notice?

A. Well, I did not notice that very particularly, only the ball part of the lantern hanging up.

112 Q. You mean the hangers?

A. Yes, sir.

113 Q. What part did you find on the floor?

A. Found the bottom part of it.

114 Q. Was any glass broken about?

A. No, I do not remember looking for any glass.

115 Q. Where was the lantern at the other end?

A. Never had any lantern at the other end.

316 116 Q. You did not see any lanterns?

A. Wasn't any lit out of Lexington. Might have been in there but wasn't any lit out of Lexington.

117 Q. You don't know whether they lighted it or not?

A. No, sir.

118 Q. How many horses were in that car when you got in there?

A. There were three there left.

119 Q. Had three left in there when you got back?
A. Yes, sir.
120 Q. What became of those?
A. I don't know. You see we went off and left them.
121 Q. Who was the engineer on that train?
A. Mackay.
122 Q. What was the name of the fireman?
A. Burns.
123 Q. Were any of them there when you tried to get in?
A. Yes, they were both there.
124 Q. Who else, if anybody?
A. Well, three brakemen and myself.
125 Q. What were you all doing?
A. Were assisting in putting out the fire; some of them were helping to get the horses out of the car.
126 Q. When you first discovered the smoke issuing out of that car; were you in motion?
A. Yes, sir; going South.
—. ——.
—. ——.
128 Q. Was the car then headed for Louisville—the 317 train——
A. It was headed for Louisville and we had coupled up to our original train.
129 Q. What did you have to do?
A. We had not coupled up.
130 Q. What did you have to do?
A. We had to go out on the main and come down. We discovered it going out of the side track.
131 Q. At that time you had not coupled up to your original train?
A. No, sir.
132 Q. How many cars after that time were attached to the engine?
A. About ten cars.
133 Q. Did you see any policeman there that night?
A. I saw a policeman at the depot, when I first went there.
134 Q. Whereabouts did you see him?
A. Kind of in front of the depot.
135 Q. Which front? Fronting the railroad track?
A. Yes, sir.
136 Q. Had you met him on the road as you came up?
A. No, sir.
137 Q. When you went in there and got those horses out, did you look to see if they were burned or not?

Plaintiff objects.

A. I went in there after they got the five horses out and the fire was put out.
138 Q. And you say you did not see any of the horses in there?
A. I saw three of them in there.

318 139 Q. And did you examine the horses that were out?
A. Yes, I noticed all of them. There was one horse that his feet got caught in a frog.
140 Q. What kind of weather did you have there?
A. A slight snow on the ground.
141 Q. What was the temperature?
A. Quite cool.
142 Q. Was it cool or cold?
A. Cold.
143 Q. You left the horses there and went up to the depot?
A. Yes, sir.
144 Q. Did you take a lantern?
A. Yes, sir.
145 Q. And you left the horses back there with the colored men and the other men?
A. Yes, sir.
146 Q. Did you see the policeman as you went up to the depot?
A. Yes, sir.
147 Q. And when you came out?
A. I saw him when I first went to the depot.
148 Q. Who was with him—anybody?
A. No, sir.
149 Q. What was the policeman doing?
A. Well, he was standing there waiting for me. In fact, you know, I know him and he asked me what was the matter. And I said we had a car of horses on fire; and he walked in to the telegraph office with me.
319 150 Q. And you went to telegraph?
A. Yes, sir.
151 Q. He asked you that as he first met you when you were coming up?
A. Yes, sir.
152 Q. Who was the telegraph operator?
A. Yontz.
153 Q. Where is he now?
A. At Frankfort.
154 Q. When you went back what had become of the policeman?
A. I don't know what became of him then. I don't remember ever seeing him again.

Cross-examination.

1 Q. Did you get in the car before those horses were taken out?
A. No, sir.
2 Q. Did you go in the car after the horses were taken out?
A. After five were taken out.
3 Q. Don't you know that six were taken out?
A. No, sir; only five, I can remember.
4 Q. You examined the five that were taken out?
A. Yes, sir.
5 Q. Casually, with a view to making a report to your Company?
A. Yes, sir.

6 Q. You know they were in perfect condition?
A. Seemed to be in perfect condition.
320 7 Q. Any sing-ing of the fore-top, or burns on their noses?
A. No, sir.
8 Q. Any singe of the hair, mane or tail?
A. No, sir.
9 Q. Nothing of that kind on either of the five horses that were taken out?
A. No, sir.
10 Q. Did you go in the car after those five horses were taken out?
A. No, sir.
11 Q. What did you discover in the car after the horses were taken out?
A. I discovered three horses that were burned terribly bad.
12 Q. Where were the five horses that were taken out?
A. They seemed to be in this end of the car.
13 Q. Oh, you just told the jury that they had been taken out when you got in there?
A. They had.
14 Q. Where were they when you got in?
A. They were on the ground.
15 Q. Who had them?
A. A man had them, a darkey; they were loose, some of them.
16 Q. How were those horses gotten out of that car?
A. Drawn out—shoved out.
17 Q. Who shoved them out?
A. Two negroes got in the car and all the white men.
18 Q. What negroes?
A. Well, I cannot recall their names.
321 19 Q. Didn't a yellow negro go in there?
A. Yes, sir.
20 Q. Didn't a black negro and yellow negro do the shoving and take out all of those horses out of that car?
A. No, sir; not altogether.
21 Q. How were they taken out of the car?
A. They were pushed or led to the door and shoved out.
22 Q. Who was on the ground to pull as they were doing the pushing?
A. I——
23 Q. You didn't go in?
A. I didn't go in the car, but I was on the ground helping.
24 Q. How long after the fire ceased before you got in the car?
A. The fire was put out. I was carrying water while they were in there, putting the fire out and bringing the horses out.
25 Q. Don't you know that this car, and engine attached, was moving at the time that the fire first came to the notice of those trainmen?
A. I was the first one that saw it.
26 Q. Answer my question?
A. What is the question.

27 Q. Read the question (which the stenographer does).

A. Yes, sir.

28 Q. Don't you know that the door at the right-hand side of the car, at the end of the car toward Louisville, was not opened at all until after the fire was put out?

A. Toward Louisville? The South door?

29 Q. I am talking about the door on the right-hand side as you go towards Louisville.

322 A. It never was opened until we got the horses to the stock shute. We tore the door practically all to pieces, even pressed the panel in.

30 Q. And isn't the reason you did that, was so you could put water from the engine tank in there to put that fire out?

A. No, sir. At first we carried at least 50 buckets of water. Carried them through this other door and threw away into that end.

31 Q. You did not carry that much until after the five horses were taken out?

A. Yes, I did; considerable.

32 Q. You did not carry any through there?

A. I handed it up.

33 Q. What time did your train reach Frankfort that night?

A. 11:14.

34 Q. What time did you reach West Frankfort?

A. About 11:30.

35 Q. Tell the jury what you did there after you got to West Frankfort?

A. We had to reduce our train, back up cars, and reduce our dead freight stuff.

36 Q. How did you do that?

A. We set off some cars we had from Lexington and set them in the track and picked up some cars at Frankfort.

37 Q. Where was this car in which these horses were?

A. The second car from the engine.

323 38 Q. The second car from the engine?

A. Second or first. I do not remember positively about it.

39 Q. Have you very much distinct recollection about this night at all?

A. Certainly I have.

40 Q. Tell us where that car was then?

A. Either the second or first one next the engine.

41 Q. Don't you know it was the first one next to the engine?

A. Yes, next.

42 Q. Don't you know it was the second car to the engine?

A. I know it was one or the other.

43 Q. What kind of car was there next to the engine?

A. L. and N. box car.

44 Q. When did you get that L. & N. box car between the engine and the horse car?

A. As we came out of Lexington.

45 Q. Didn't you tell this jury that this horse car was the next car to the engine?

A. Next? I said near the engine.
46 Q. What car was this that these horses were in?
A. Arms Palace car.
47 Q. Speak that first word?
A. Arms.
48 Q. Did you see this car before you left Lexington?
A. Yes, sir.
49 Q. Which one of the doors was open when you first saw it?
A. Both doors were open on the right-hand side.
50 Q. You got up into the car, you say?
A. On the step of the car, and looked in.
324 51 Q. What steps?
A. Steps of the Palace car.
52 Q. Where are those steps?
A. Well, not the steps, but I reached my head up there and looked into the car.
53 Q. Tell us what steps this palace car had?
A. I don't know whether this car had steps on it, but I know I got my head up and hands up as far as the door and asked him how many there were.
54 Q. Did it have steps hanging from the door?
A. They do have steps.
55 Q. Did this one have any?
A. I don't remember whether it did or not.
56 Q. Tell us what steps you got up on?
A. I don't know whether I got up on any or not.
57 Q. What did you see?
A. I know I got up in the car and looked.
58 Q. Did you see anybody in there?
A. No, sir.
59 Q. Which door did you get up into?
A. I got up to both doors on the right-hand side.
60 Q. And you saw the horses in there?
A. Yes, sir.
61 Q. What time did your train leave here.
A. About 9:15.
62 Q. You were the conductor on that train?
A. Yes, sir.
63 Q. And you say you saw and knew at the time you left Lexington that the yellow boy was drunk?
A. Yes, sir.
64 Q. Did you know that the black one was?
A. Yes, sir.
325 65 Q. Well, you took them on in that condition on that car?
A. Yes, sir.
66 Q. And were the doors on the right-hand side of the car, as you go towards Louisville, closed?
A. Well, in fact after I had taken the train I never walked back to the car any more.
67 Q. You don't know anything about that car, do you?

A. Until we got to Frankfort.

68 Q. You don't know whether these doors on the side of the car, same one towards Frankfort, were open or closed?

A. After we departed from here I don't; I did before we left though. I examined them as I checked the train.

69 Q. How long was that before you pulled out?

A. About 25 minutes.

70 Q. And you didn't look in the 25 minutes more to see what condition the door was or the drunken men?

A. It taken me at least that time to get the bills and orders ready.

71 Q. You go through a tunnel, as you go over here to Frankfort, don't you?

A. Yes, sir.

72 Q. You didn't take pains to look and see whether they were open or not?

A. Those doors were open on the inside; they cannot be constructed.

73 Q. You did not take the pains to look?

A. Not on the train of 25 or 30 cars; it would be impossible to see.

326 74 Q. What time did you get to Frankfort.

A. 11:14.

75 Q. And then immediately after left Frankfort?

A. Left Frankfort at 11:20.

76 Q. Did you cut your engine loose from that train at all?

A. No, sir.

77 Q. How many cars did you cut off from the engine while you were doing the switching?

A. I cut off 17 at first and set in 11.

78 Q. How many were in the train before you cut off the 17?

A. Well, about 25 or 30 cars.

79 Q. From which end did you cut them off?

A. Well, we cut them off the head end of course; Next to the engine.

80 Q. Cut them off next to the engine?

A. We cut them off so we could pull them out. It does not make much difference which end you cut them off.

81 Q. The ones you cut off, were they on the head end next to the engine or on the tail end of the engine towards Lexington?

A. I suppose as much towards the front end as the tail end.

82 Q. Did you have a caboose?

A. Yes, sir.

83 Q. Did you cut the caboose?

A. They were drawing the caboose, if that is what you want.

84 Q. Did you cut the caboose off with the other seventeen?

A. No, sir.

85 Q. Did you leave the caboose at Frankfort?

A. Left it standing there with the train.

327 86 Q. How many did you carry forward?

A. I think we had 31 cars after. We broke up at Frankfort.

87 Q. After you cut off 17 and picked up 11?
A. We picked up at least 16 or 17, there.
88 Q. Did you take water between here and Frankfort?
A. At Frankfort.
89 Q. At West Frankfort?
A. At West Frankfort.
90 Q. Did you take that whole train in there to get that water?
A. We taken water on the main track.
91 Q. Do you call the main track the one next to the creek down there or the one away from the creek?
A. That is the middle track.
92 Q. How did you back away on the middle track.
A. We taken water before we went to West Frankfort; first taken water and we pulled through straight as we were pulling into West Frankfort, before we got to West Frankfort. The water tank sets at West Frankfort.
93 Q. Ain't the water tank the other side of the river?
A. Yes, sir, but not the other side of the yards.
94 Q. But how far is the other side of the far end of the bridge beyond the far end of that water tank?
A. 35 or 40 yards.
95 Q. Is there a street at the immediate far end of that bridge?
A. Yes, sir.
96 Q. That crosses your railroad track?
A. No, sir, there is a crossing, I think.
328 97 Q. Taylor Avenue that leads on down and crosses the railroad bridge, isn't it?
A. Yes, sir.
98 Q. How far is it from there to the Water tank?
A. 35 yards, I suppose.
99 Q. Where is your switch?
A. Right within 5 feet or 10 feet from the crossing.
100 Q. Where did you go to get that water?
A. We went on the main track—rode right at the water tank.
101 Q. On the right-hand track.
A. Going South.
102 Q. I thought you said you took it from the stock track?
A. You spoke of that when you spoke of the yards down there.
103 Q. I am talking about the water tank.
A. We took the water just as we got into the yards. Just as we got into West Frankfort.
104 Q. How far is it from that water tank to the County Road that crosses the railroad beyond that water tank before you get to the yards?
A. Just 15 car lengths.
105 Q. How long is a car?
A. They range between 35 and 50 feet.
106 Q. Well, now, what was the length of those cars on that train?
A. Well, now, I don't know. Just an average car, just the way they run. Some trains you will have 40 feet; some of them, the

next train, perhaps, you would not have any. So there is no regularity in them.

329 107 Q. Just how many feet is it, please tell us, beyond this water tank to that County Road crossing?

A. I don't know exactly, without figuring it up. I imagine about 500 feet.

108 Q. Now beyond that road crossing how far is it to your yards?

A. Well, the switch and 65 feet and that road crossing.

109 Q. Yes, before this switch ain't there two or three houses along your right of way before you get to the yards?

A. The switch is this side of the houses.

110 Q. How many yards have these houses to them before you get to the railroad yard?

A. They have not any yards. The switch is within four feet of the houses; that is, the track.

111 Q. Do you know what distance it is across this freight yard along your right of way there?

A. No, sir; I never paid any attention to it.

112 Q. Well, as near as you can get at it, how far beyond the County Road is it to your yard?

A. Well, you might say 10 feet; because there is a switch.

113 Q. You mean there are two houses on a ten foot lot?

A. You mean where the houses is?

114 Q. Yes.

A. They are right by the side of the yard.

115 Q. I know, but how much space is there between the County Road and your yard and the yard of these houses?

A. There is no fence there whatever?

116 Q. I ain't talking about the fence.

A. You see the road runs in this direction and here is the houses and here is the yards and there is a switch. (Indicating on the stand before him.)

330 117 Q. After you got down there on the switch what did you do?

A. We picked up and set off cars.

118 Q. How did you do that? Did you do it with the whole train, the coupling up or did you get the engine loose with the cars attached to it?

A. We done the switching with the cars. We set off there and then we picked up the cars with the cars that we were to take on.

119 Q. Where did you pick the cars up?

A. In four or five car lengths of the engine.

120 Q. You cut loose from 17 cars, did you?

A. At the first time.

121 Q. And then took the other cars and engine back and forwards?

A. Yes, sir.

122 Q. Back into the side track?

A. Yes, sir.

123 Q. And coupled them to the other cars?

A. Shoved the other cars——

124 Q. Shoved 17 cars?
A. Yes, eleven of them.
125 Q. And then you came out again with those you had left?
A. Yes, sir.
126 Q. Where did you go to get eleven that you picked up?
A. I don't know. We may have picked up more than 11. We got them on the other side of the track. We placed them on the other side.
127 Q. So you pulled up here and backed down on the other track?
A. Yes, sir.
331 128 Q. And picked up the other cars?
A. Yes, sir.
129 Q. You had to shove these cars down on the other cars to make that coupling, didn't you?
A. Yes, sir.
130 Q. And then you coupled and pulled out again?
A. Yes, sir.
131 Q. How many times did you go through that operation?
A. Only three or four times.
132 Q. And then, after making the last coupling how long before you started forward again?
A. Probably only a second.
133 Q. And then it was you discovered the smoke?
A. The smoke was immense coming out of the car.
134 Q. Then you undertook, as you have described, to put the fire out?
A. After we left the yards and went out on the main track where we had a clear opening place, we did.
135 Q. You cut this car loose and carried it down there and placed it away from the other cars?
A. Yes, sir.
136 Q. Then you undertook to get these horses out?
A. Yes, sir.
137 Q. Well, did you, while you were trying to put the fire out, have the engine coupled to this car?
A. Had the engine coupled to these two cars.
138 Q. To these two?
A. Yes, sir.
332 139 Q. The box car coupled to the engine and the horse car?
A. Yes, sir.
140 Q. You got five horses out, you say?
A. Yes.
141 Q. And you left three in there?
A. Yes, that is as near as I can say. I think possibly we left other horses in the car; I am almost sure we did.
142 Q. Then you went on from there to the depot?
A. Yes, sir.
143 Q. And then you went back again?
A. Yes, sir.
144 Q. Did you go with those boys or did you go ahead of them?

A. Went ahead.

145 Q. Did you carry a lantern?

A. Yes, sir.

146 Q. When you came back, did you look into this stock car again?

A. Yes, sir.

147 Q. Get up in it?

A. Yes.

148 Q. How many horses were there then?

A. Three, I think.

149 Q. Don't you know—wasn't it your place to know?

A. Yes, but right at that time in that excitement of these horses——

150 Q. You were so excited then you have not gotten over it now, have you?

A. No, sir.

333 151 Q. What did you do with the car and the three horses after you got back?

A. Placed them in the stock shute.

152 Q. Did you take the horses out?

A. No, sir.

153 Q. Why didn't you take them and put them in a pen?

A. We didn't know anything about the horses. It was as well to leave them in there as to put them in the shute.

154 Q. You didn't put that car where they could be taken out by anyone else?

A. Yes, sir.

155 Q. Don't you know the ground was frozen and the bar bent and you could not shove that car up far enough to get them out?

A. The shute could have been placed at the car without any trouble. Any man can handle that or any other shute by himself.

156 Q. Don't you know that the frozen dirt had to be taken out and the door had to be taken out?

A. There is no door on that shute at all. It is done by a wooden hanging.

157 Q. When you left that car on that siding by the shute—did you cut your engine loose from that car and then go ahead?

A. No, we made the drop on that car while I was in Frankfort and we all went down there to look at the car.

158 Q. Still three colts in it? And the five that were taken over to Frankfort, you say they were in perfect condition?

334 A. At the time they were taken out of the car there did not seem to be anything the matter, only this horse that was led his feet seemed to be hurt.

159 Q. And there was no singeing of the hair on any of them, or any burns?

A. No, sir.

Redirect examination:

1 Q. How far is it from the East end of the bridge over to the water tank?

A. 645 feet.

2 Q. How did you state that?

A. I measured it.

3 Q. When?

A. This morning.

4 Q. Was that train longer than that that morning?

A. Yes, sir; it was a little longer.

5 Q. What sort of a water tank was that?

A. Just a plain tank with a spout.

6 Q. When you go to putting water into an engine tank, how do you take it from the water tank?

A. Just conveyed by an iron crane or tin crane and there is a pipe connected from the water tank into this crane. It is kind of worked by a groove that connects from the engine tank into the water tank.

335 7 Q. Is there anything except an iron pipe where the water goes out into the——

A. There is a crane that lets down the water pipe.

8 Q. Now, at the end of that water pipe where it goes down into the man hole was there anything there?

A. Wire netting.

9 Q. Is that wire netting attached to that pipe that lets down or attached to the man-hole?

A. To the man-hole.

10 Q. When the pipe from the tank goes into the man-hole how does that notch fit around it?

A. It is set in there.

11 Q. Does it come up to the top of the engine?

A. Yes, very close.

12 Q. Does it come up to the top of the engine?

A. Kind of like a bulge and sets over the man-hole.

13 Q. I don't think you understand me,—here is the tank now—this pipe goes down here. You mean the water crane?

A. The water crane.

14 Q. When it goes down into the man-hole you say there is a notch there?

A. Yes, sir.

15 Q. Does that notch come in contact with the end of the ground pipe?

A. No, it is about 6 inches from the bulge of the crane.

336 16 Q. How high does it come up to the level of the tank?

A. You see this man-hole—this crane is set in the man-hole.

17 Q. Does the crane come down into the man-hole?

A. Yes, about 1-1½ feet.

18 Q. So that the water does not come out of it until the end of the crane is down in the tank about the end of the tank?

A. No, sir.

19 Q. How many feet did you say it was from the North end of the bridge to the water tank?

A. 625.
20 Q. Where did you begin to measure?
A. Just at the North end of the bridge.

Recross-examination.

1 Q. Are you employed by the L. & N. R. R. Co?
A. Yes, sir.

Adjourned to meet at 9 o'Clock a. m. Dec. 20th.

Met pursuant to adjournment.

2 Q. You were on the stand when court adjourned yesterday afternoon; I wish you would tell the jury whether there was or was not any unusual jarring, or bumping or jumping of the cars?

Defendant objects; which objection is overruled by the court—to this ruling of the court defendant excepts.

337 A. No, there was no unusual jars, no more than there usually are.
3 Q. What was the extent of the——
A. Only in coupling our train.

Redirect examination.

1 Q. There is where the jar usually comes, Mr. Fisher, in coupling up a train?
A. Yes, sir; the jarring of the train.

MACKAY, A. J., who being duly sworn testified on behalf of the defendant as follows:
1 Q. What is your occupation?
A. Locomotive engineer.
2 Q. On what road?
A. L. & N.
3 Q. What was your occupation in November 1910?
A. Freight engineer.
4 Q. In the employment of what Company?
A. L. & N.
5 Q. Upon what sort of train were you running then?
A. Freight.
6 Q. Where was your usual run at that time?
A. Well, as a usual thing I am between Cincinnati, or Latonia, and South Louisville.
338 7 Q. Well, on the 17th day of November, 1910, what run did you make that night?
A. We went out of here on No. 29.
8 Q. What is 29?
A. Well it is a freight run between Lexington and South Louisville.
9 Q. Do you recall what time that train left Lexington?
A. Shortly after nine o'clock. I would suppose about—maybe 9:10 or 15.

10 Q. From what point did you leave?
A. The freight yards down there.
11 Q. Freight yards in West Lexington?
A. Yes, sir; I suppose you called it West Lexington.
12 Q. Do you know whether or not you had on that train, as one of the combination cars, a certain Arms Palace car?

Plaintiffs object; which objection is overruled by the court; to which ruling of the court plaintiffs except.

13 Q. Well, any Arms Palace horse car?
A. Yes, sir.
14 Q. Do you know whose horses were in the car?
A. I do not.
15 Q. Do you recall what position on that train that car occupied when you left here?
A. Yes, sir.
16 Q. Where was it?
A. Next to the engine.
17 Q. Did you see any—well, do you know what was in that car?
A. I did not.
339 18 Q. Did you see any of the attendants before you left Lexington?
A. I did not.
19 Q. Where did you go when you left here. What was your destination? Louisville? And did you go there?
A. Yes, sir; we went there.
20 Q. Well, do you remember whether there was anything unusual occurred at Frankfort?
A. At West Frankfort: Yes, sir.
21 Q. Can you recall whether this engine took water at Frankfort or West Frankfort?
A. Yes, sir; we did.
22 Q. Where is that water tank at West Frankfort.
A. Well, West Frankfort is on the other side of the river. It is about ten or twelve car lengths from the bridge.
23 Q. West from the bridge, or South as you call it?
A. Yes, sir.
24 Q. About what distance in feet, as near as you can give, from the West end of the bridge?
A. From the West end of the bridge to the Water Tank?
25 Q. Yes, sir.
A. Between 3 and 400 feet, I suppose.
26 Q. How many cars did you have attached to that train when you reached that water tank.
A. Well, I would suppose that we had about 25 or 26 or 27; something like that. I don't really know.
27 Q. You don't know?
A. No, sir; I don't know.
340 28 Q. Where was the engine stopping to take water at that water tank, where would be the rear end of that train resting while you were at that water tank?

A. It would be very near on this end of the bridge.

29 Q. Would it be across it?

A. Very near; about across it.

30 Q. How did you take water into the engine at that tank?

A. There is a man-hole in this tank that we pulled the spout down that fits down in this man-hole, and there is also a strainer there to keep any foreign substances from getting into the water.

31 Q. Is that pipe, as you call it, called the crane?

A. Yes, some of them are called water cranes.

32 Q. This is on every water tank?

A. We just call it a pipe we pull down.

33 Q. Tell the jury whether the end of that water pipe which goes down to the man-hole, goes into the man-hole or not?

A. Well, yes, sir, it goes into it about 10 or 12 inches below it.

34 Q. Do you know anything about what quantity of water you had in your engine tank?

A. Yes.

Plaintiffs object.

35 Q. If you do not know, say so.

A. I could not say; no, sir.

36 Q. I will ask you whether it is possible for a man standing on the East end of that bridge to hear the water pouring from that water tank and through that water pipe into the engine tank?

A. It is not, positively.

341 37 Q. How far can the sound of the water emptying from the water tank into the engine tank be heard?

A. About a couple of car lengths.

38 Q. After you got to West Frankfort, what did you do with that train?

A. Well, we had some three or four switches to make there after taking water, pulled down to the South end of the yard and started making those switches.

39 Q. State to the jury whether or not there was any jarring or bumping or crashing of the cars, or any car, in making that switching?

Plaintiffs object.

(Answered before the court rules.)

A. It was not.

(The COURT: It is leading.)

Q. 40. Just tell what occurred during the making of that switch as to the motion of the cars and their coupling up?

A. Well, I don't understand what you want me to tell.

Q. 41. What occurred in the coupling of those cars; was there anything unusual occurred?

A. No, sir; nothing unusual.

Q. 42. Well, was there or not bumping out of the ordinary?

A. No, sir; there was not.

Q. 43. Was there any striking?
A. No, sir.
Q. 44. Was there any such crashing or bumping of the cars during the making up of your switching operations there as could be heard across the bridge a square or two up towards——
A. No, sir.

Plaintiffs object because this man was in the accident and was not across the bridge and did not know.

342 The COURT: If he does not know, he can say "no, sir," and if he knows he can say.
To this ruling of the court plaintiffs except.

45 Q. What was your answer to that?
A. I said there was none.
46 Q. What was the first thing out of the usual occurrences that occurred there?
A. Well, I was signed down by Conductor Fisher and signalled to stop.
47 Q. Mr. Fisher was conductor of that train?
A. He was.
48 Q. Go on.
A. And about the same time I think he hollered the car was on fire and get this car off and run it out on the main.
49 Q. Where was the train standing when that occurred, upon what track when you say he cut that car off?
A. We were in the passing track.
50 Q. How far did that car move on that occasion, to cut it off from the balance of the train?
A. Oh, we were only three or four car lengths after being signed out.
51 Q. Before you made that motion, had your train made up?
A. No, sir.
52 Q. When your attention was called to the fire by the conductor, were you in motion or standing still? Just state all about it.
A. It was in motion.
53 Q. Which way were you moving?
A. South.
343 54 Q. Where were you going then?
A. I was getting out of the switch, out of this passing track.
55 Q. Had you started for Louisville?
A. No, sir; the train was not made up.
56 Q. How many cars did you pull out of there when the conductor told you——
A. I could not answer to that; I don't know.
57 Q. When you moved out of the way, how many cars——
A. Oh, just one.
58 Q. What car was that you had there?
A. A Horse car.
59 Q. What occurred after you got out of the way of the balance of the train there?

A. Why, I jumped down off the engine and went back to see what was the matter. The doors were all fastened up and I could not say whether it was Mr. Fisher or me, either one, that went for the coal pick. I comes back to the engine for the coal pick to try to break in the door.

60 Q. Were any of the doors open on that car?

A. No, sir.

61 Q. Why did you want a coal pick?

A. Why, I wanted to break the door down to get into that car.

62 Q. Could you not get in otherwise?

A. Those doors were fastened from the inside; we could not get them open.

344 63 Q. Whom did you see, if anybody, standing about the car?

A. No one.

64 Q. What did you do with the coal pick?

A. We tried to break those doors in.

65 Q. Which doors?

A. The ones on the South end of the car on the right side as you go to Louisville.

66 Q. Did you make any progress in doing that?

A. No, sir.

67 Q. What happened while you were trying to do that?

A. Finally made fuss enough there to rouse the darkies in the car. They opened the door on the opposite end; same side of the car, and came out.

68 Q. Had you seen them at all before they came out, after you were trying to break into that car, had you seen any of those darkies?

A. No, sir.

69 Q. Just tell the jury what happened then. What you all did and what took place?

A. Well, we all hammered on that door quite a little, trying to get in there. If we could have gotten that door open we could have put that fire out without any trouble. But we could not. After we got the door at the other end open we carried water in, had to go through a door on the North end and take it through the car, and we made slow progress there to put the fire out. In the meantime we jumped five horses out of that car.

70 Q. What door did they come out?

A. They came out on the North end, right side.

345 71 Q. Who got those horses out?

A. Could not really say. My fireman, though, was the first man in that car after those darkies came out.

72 Q. What is his name?

A. Burns.

73 Q. Did he get into the car before or after the horses were gotten out?

A. Well, he was in there both. He was in there before any horse was taken out.

74 Q. Did you see how the horses were gotten out?

A. Yes, sir.

75 Q. Describe it to the jury.
A. Why we just jumped them right out of the car.
76 Q. Did you see the horses?
A. Well, yes, I saw them at night.
77 Q. What time was that?
A. It was—it must have been about 11:45.
78 Q. Well, what was the condition of the horses?
A. I cannot answer that question.
79 Q. Did you examine them?
A. No, sir.
80 Q. Did you get close up to any of them?
A. I was close to some of them. I made no examination whatever. I could not say.
81 Q. Was it light or dark?
A. Well, it was at night; 11:45. Something along there at night.
82 Q. Any light shining around there?
A. Not much. Of course we had lanterns around there. I had my torch but I made no examination whatever of those horses.
346 83 Q. And you cannot state as to the condition of any one of them?
A. No, sir; I will not.
84 Q. Do you know what became of the horses?
A. They started leading them over to Frankfort.
85 Q. Who did that?
A. Why those attendants with them.
86 Q. What became of Mr. Fisher, the conductor?
A. Well, he went back over to Frankfort.
87 Q. Did you see him leave there?
A. Yes, he told me he was going back to——

Plaintiffs object; which objection is sustained by the court.

88 Q. Just tell in what direction did you see him go?
A. Why I knew he went to Frankfort, for the reason——

Plaintiffs object.

89 Q. Never mind; the court told you not to say what anybody told you—in which direction did he go?
A. North, as we speak of it.
90 Q. How would he go to get to Frankfort?
A. Going, walking across the bridge.
91 Q. Did you see whether he had any lantern or not?
A. Yes, sir; he had his lantern.
347 92 Q. What became of the horses then?
A. Well, now, I don't know what became of them. They went in the same direction.
93 Q. Who went with them?
A. Those attendants, to the best of my knowledge. I could not say whether anybody else was with them or not.
94 Q. How long after Mr. Fisher started before the horses started?
A. I could not say.
95 Q. Well, about?

A. Well, it was some little time I would imagine.
96 Q. What you know?
A. Maybe 15 or 20 minutes.
97 Q. In what direction did they start?
A. Same direction as Fisher.
98 Q. How could they get to Frankfort? By what means? Bridge or what?
A. Bridge.
99 Q. That is the bridge you just described?
A. Yes, sir.
100 Q. Do vehicles, and horses, pass over that bridge?
A. Must have been.
101 Q. Can they do it? Was there a place for vehicles, horses and carts?
A. Yes, sir.
102 Q. Did you get inside that car?
A. I did not.
103 Q. Was there any fire burning on the outside of that car?
A. No, sir.
348 104 Q. Can't you state to the jury whether or not the car was burned through at any place?
A. It was not.
105 Q. Do you recall any men coming alongside of the engine and hollering to you to stop?
A. No, sir.
106 Q. Did anything like that occur to you before you d'd stop?
A. No, sir.
107 Q. How long had you been standing there where you stopped and you say these attendants came out of the car?
A. We was there three of four minutes.
108 Q. And you saw them come out?
A. Yes, and the door was open before I saw them.
109 Q. How long did it take you to cut the car off from the train when you did cut it off, or it was cut off, and move to the position where you stopped?
A. That would take three or four minutes.
110 Q. *What* it take as much as that?
A. Every one of it from the time he gave me that stignal to stop and cut that car off and then made these three car lengths.
111 Q. Did you understand why he gave you that signal?
A. Well, he signed me down and hollered the car was on fire and cut it off and gave me the signal to go ahead.
112 Q. After he said that to you, how long after the coupling was done that you moved around and got into position there?
A. Well, I do not really understand that question.
113 Q. He hollered to you to move off that track and go to the other place. Did he have the car uncoupled when that signal was given you?
349 A. No, no; he had to uncouple this car.
114 Q. Now from the time he hollered to you and sig-

nalled to you to make that movement, what interval of time occurred until you stopped the car, how long were you doing that?
A. Three or four minutes.
115 Q. When did Mr. Fisher come back? Do you recall how long he was gone in the direction of Frankfort?
A. He was gone about an hour.
116 Q. Where were you in the meantime?
A. I was on my engine.
117 Q. Had you moved the car?
A. Yes, sir, we had.
118 Q. Where did you move that car?
A. Placed it at the shute.
119 Q. Do you recall whether or not any of the horses were left in the car after they got those five, of which you spoke, out?
A. There was.
120 Q. How many?
A. Three.
121 Q. Then what was done with those horses; or do you know?
A. Left in the car.
122 Q. And the car placed where?
A. At the shute.
123 Q. How long did it take you to do that?
A. 15 or 20 minutes.
124 Q. To put that at the shute?
A. Yes, sir.
350 125 Q. That is, to get the other horses out and put these at the shute, 15 or 20 minutes to do that and move back and put them at the shute?
A. Yes, our train was on the main track. We have to shove those out of the way before we could get to the shute.
126 Q. Do you remember when Mr. Fisher came back?
A. I could not answer that.
127 Q. What did you do after you get that car off and put it at the shutes?
A. We backed away again, waited until Mr. Fisher came back and then we were ready to go.
128 Q. Now, what time of night was it when you started away from there?
A. I could not say.
129 Q. You could not tell how long Mr. Fisher was gone there?
A. No, about an hour, though.
130 Q. How long did that accident keep you there altogether?
A. Over two hours.

Cross-examination:

1 Q. What is your name?
A. A. J. Mackey.
2 Q. Where do you live?
A. Louisville.
3 Q. How long have you lived there?
A. About eight years.

4 Q. Where did you live before you went to Louisville?
A. Covington.
351 5 Q. How long have you been in the employ of the L. & N. Railway?
A. For over ten years.
6 Q. Still in their employ?
A. Yes, sir.
7 Q. How long have you been an engineer?
A. About seven years.
8 Q. Where was your regular run?
A. Didn't have any regular run.
9 Q. Didn't you tell Col. Thornton, in your examination in chief, that your usual run was from Cincinnati to South Louisville.
A. That is the usual run, but I have no regular run.
10 Q. How long have you pulled No. 29 out of Lexington toward Louisville?
A. My experience as an engineer.
11 Q. Yes, sir.
A. Several 100 times.
12 Q. Then you knew the road perfectly?
A. Well, I am supposed to. I had knowed.
13 Q. You passed the railroad depot and railroad bridge at Frankfort, that water tank and yards there as many times as you had pulled No. 29 from Lexington to Louisville had you not?
A. Yes, sir. And quite a number of other times.
14 Q. What time had you left Lexington at that night?
A. About 9:10 or 9:15; I could not positively state.
15 Q. You did not see either Chester Frakes or "Go Devil" at Lexington at all?
A. No, sir.
352 16 Q. The engine you say was next to the Arms Palace horse car in which these horses were?
A. It was.
17 Q. Where did you spend your time prior to leaving Lexington, that night?
A. Well, in the office getting my orders until about leaving time.
18 Q. How long had you been on your engine before you left here?
A. I must have been on there 10 or 15 minutes. Something like that at least.
19 Q. Now what is the length of the tender on that engine?
A. About 16 or 18 feet.
20 Q. What is the length of the Arms Palace horse car from the door on the right side, as you go to Louisville, to the back end of your tender?
A. Which door?
21 Q. On the right hand side fronting, as you go towards Louisville.
A. About 30 feet.
22 Q. Do you mean from the door on the right hand side front

on the Arms Palace car, that it is 30 feet to the back end of your tender?

A. Oh, no, I did not say that. You said from the tender.

23 Q. No, I said from the back end of your tender.

A. I misunderstood the question.

353 24 Q. Answer the question as you now undersand it, please.

A. Well, that would be about 12 feet I suppose.

25 Q. And what did you say the length of the tender was?

A. About 16 to 18 feet.

26 Q. Well, from where you were on your engine to the door on the right-hand side fronting as you go towards Louisville in that car, you were how many feet?

A. My position on that engine to the front door on that car?

27 Q. Yes, sir.

A. About 35 or '6 feet.

28 Q. Now, during the 15 minutes you were on that engine before you left here, what occurred back here by that door, that front door?

A. I could not say that anything occurred. I don't know.

29 Q. Did you hear a quarrel?

A. I did not.

30 Q. Didn't you hear the negro give your conductor some impudence?

A. I did not.

31 Q. You did not hear the negro?

A. I did not.

32 Q. Was that right-hand front door on that car open?

A. I could not say, and I don't know anything about whether it was open or not. I never saw it.

33 Q. When you left the office getting your orders and the like, which side of that train did you go in passing along to get on your engine?

A. I got in on the left side.

34 Q. On the far side?

A. Yes, sir.

354 35 Q. And which is your position on that engine, right or left?

A. The right.

36 Q. During the 15 minutes you were on that engine before you pulled it from Lexington, where were you on that engine, on the right or left hand side?

A. Very likely——

37 Q. Now, tell us, if you know, but not "very likely."

A. I cannot answer that question, because I get on my engine looking around and set my lubricator—I am in different places.

38 Q. Wasn't you down on the ground oiling?

A. No, we oil our engine at first, but very frequently do a little oiling just before we start.

39 Q. Did you do any more that night?

A. Could not say that.

40 Q. Where was your fireman during that 15 minutes?
A. He was around that engine somewhere; I could not positively answer that question.
41 Q. What was he doing?
A. He has got his duties to attend to.
42 Q. Do you know what he did that night?
A. No, sir.
43 Q. What is your fireman's name?
A. Burns.
44 Q. Where does he live?
A. He lived in Louisville.
355 45 Q. After you pulled out of Lexington at 9:15, where did you make your first stop?
A. I think we met a train at Cliffside.
46 Q. That is just this side of the tunnel at Frankfort?
A. It is.
47 Q. And if you stopped there that was the first stop you made after leaving Lexington?
A. I think it was.
48 Q. Do you recall how long you stopped there?
A. No, sir.
49 Q. Do you remember what time you reached the Union Station at Frankfort?
A. Well, it was after eleven o'clock.
50 Q. After eleven o'clock?
A. Yes, sir; I would suppose——
51 Q. Not what you would suppose; just answer the question. What time did you arrive at Frankfort?
A. 11:10 or 11:15.
52 Q. How long did you stay at the Union Station?
A. Five minutes.
53 Q. What time did you arrive at West Frankfort over at the water tank?
A. About 9:20.
54 Q. About what?
A. 11:20.
55 Q. How long did you stay at the water tank?
A. Three or four minutes.
356 56 Q. You did take water there?
A. Yes, sir.
57 Q. Then where did you go?
A. To the South end of the yards.
58 Q. Do you mean the far end of the yard towards Louisville?
A. I do.
59 Q. Tell us, please, the distance from the West end of the bridge to the water tank?
A. 27 or 28 car lengths.
60 Q. 27 or 28 car lengths?
A. I think it is about that. I never measured that distance. I could not positively state.

61 Q. Well, you have passed there several hundred times, haven't you?

A. Yes, sir.

62 Q. Now please tell us that distance?

A. Well, that is my answer, 27 or 28 car lengths.

63 Q. What — the average length of those cars?

A. 40 feet.

64 Q. Then it is 1080 feet, isn't it, from the West end of the bridge to the water tank?

A. I will take that all back now.

65 Q. Now, let us get it all right as we go along.

A. You mean this West end of the bridge? I was answering you from this East end.

66 Q. Well, now, from the East end?

A. Well, that is my answer to that.

67 Q. Now, what is the length of that railroad bridge that spans the Kentucky river?

A. I don't know.

68 Q. What is the distance from the far end of the railroad bridge to the water tank?

357 A. 10½ car lengths.

69 Q. And then it is 400 feet from the far end of the bridge to the water tank?

A. Yes, something like that, I think.

70 Q. Can't you give us any estimate after having crossed that railroad bridge several hundred times?

A. As to the length of it?

71 Q. Well, you can take that 400 off that 1080 feet, that will give you about 680 feet, does it not?

A. Yes.

72 Q. Then it is 1080 feet from this end of the railroad bridge to the water tank?

A. Yes, sir.

73 Q. Now, from the water tank how far is it to where the County Road crosses your railroad beyond the water tank?

A. On the West side of the County Road?

74 Q. Yes, on the other side of the river. The first County road that crosses your railroad track?

A. There is a road or street that crosses between the bridge and this water tank.

75 Q. I know, but that is a street in the city of Frankfort. We are 400 feet the other side of that now, between there and the water tank to that County Road, that crosses down there?

A. Well, that is 14 or 15 car lengths down there.

76 Q. That is 560 feet more if we count only 14—14 car lengths, isn't it?

A. Yes, sir.

358 77 Q. Now, how far is it from that County Road to the South and, as you call it, the end of the yards nearest Louisville?

A. 34 car lengths.

78 Q. That is 1,400 feet, more, isn't it?
A. Yes, sir.
79 Q. Then from this end of the railroad bridge to the far end of the railroad yards at West Frankfort it is 3,040 feet, isn't it?
A. Whatever that number of feet would add up.
80 Q. Well, then, it is 1,080 and 560 and 1,400?

(COUNSEL FOR DEFENDANT: That is a matter of calculation)

81 Q. You have crossed over 100 times?
A. Yes, sir.
82 Q. And having crossed and taken notice of these things, it is in your opinion 3040 feet, about, isn't it, to the far end?
A. Yes, sir.
83 Q. Now, when you got there you backed into this yard, didn't you?
A. We did.
84 Q. How much switching did you do there?
A. Made three or four switches.
85 Q. With the Arms Palace horse car attached to the engine? Didn't cut it loose at all?
A. Did not.
86 Q. Did all that switching with this car attached?
A. If you call that all, it was attached.
87 Q. Well, whatever switching you did there, you did do with this car attached?
A. It was.
359 88 Q. Did you cut out any cars there?
A. Yes, sir.
89 Q. How many?
A. I could not answer.
90 Q. Do you know how many cars you kept attached to the Arms Palace car back of your engine and the point where you cut the others loose?
A. No, sir.
91 Q. What time was it when you backed away at West Frankfort at that tank?
A. 11:20, I told you, I think.
92 Q. What is the capacity in gallons of that tank?
A. 7000 gallons.
93 Q. Then you did the switching after taking that water?
A. I did.
94 Q. Had you completed the switching that you had to do there before you found out that this car was on fire?
A. It was not exactly completed, but when we were coupled up it would be completed.
95 Q. Well, you were not completed, were you?
A. We were on the passing track; pulled out to the main track, coupled up to the cars, on the main, and that was through and complete.
96 Q. Well, had you just backed down and picked up some cars before you started out of the passing track?

A. We went in there, yes, sir, and got some cars.

97 Q. You went in there and got the car?

A. No, we got more than one; I could not say——

360 98 Q. Describe to the jury how you got those cars?

A. I don't understand what you mean.

99 Q. Well, you backed up, didn't you?

A. Yes, sir; backed up and coupled on to some cars.

100 Q. And you have to do that by shoving cars that are attached to your engine up to the other car so you could be coupled?

A. Yes, sir.

101 Q. You did that?

A. Yes, sir.

102 Q. And you have to start forward again and go in and take up the remaining portion of your train?

A. Yes, sir.

103 Q. How long was it after you picked up these cars and found out that the Arms Palace car was on fire?

A. It was as much as 8 or 10 minutes.

104 Q. And that was the last coupling you did?

A. That was the last coupling that we wanted to do—we had to couple to our train you know.

105 Q. What were you doing during those eight or ten minutes?

A. Those cars that we coupled up to in the side track you know. After coupling them together those boys had to get on top there to let the brakes off and give me a signal to go ahead. I had to go then quite a distance out of this passing track and that is where the eight or ten minutes was consumed.

106 Q. And then you moved forward?

A. Yes, sir.

361 107 Q. And you were just moving forward when you were signed down?

A. Oh, no, we had only approached near the North post of the passing track.

108 Q. But you were moving slowly?

A. Oh, yes, we moved very fast switching.

109 Q. And then it was your conductor signed you down?

A. Yes, sir.

110 Q. After you got off of your engine to go back to that car you saw the doors were closed?

A. They were.

111 Q. Was there much fire in the car?

A. No, not at first. It was just some hay burning.

112 Q. How do you know. Were you in there?

A. No, we could see the light of it through the windows and the doors.

113 Q. Could you tell the difference between burning hay and burning coal oil from the light coming through the window?

A. Well, now; I could not——

114 Q. Then how did you tell this jury there was just some hay in it?

A. Well, that was my opinion.

115 Q. You yourself wasn't in that car?
A. I was not.
116 Q. You don't know what happened in the car?
A. I don't know. No, sir.
362 117 Q. But there was not much fire in it?
A. No, sir.
118 Q. Now, you understand to break the right-hand front door the one towards Louisville?
A. We did.
119 Q. What did you use on that door?
A. A coal pick.
120 Q. Did you get it open?
A. Never did.
121 Q. Wasn't the door on the right-hand towards Lexington opened from the inside?
A. They are all fastened from the inside.
122 Q. I asked you if that door wasn't opened on the inside?
A. At that time?
123 Q. Yes.
A. It was not.
124 Q. How did they get out? Did they go through the door without it being opened?
A. No, they opened it, but it wasn't open at that time.
125 Q. While you were picking at that back door someone opened it, didn't they?
A. Yes, sir.
126 Q. Was there much fire in there then?
A. No, there never was much fire in the car.
127 Q. Never was?
A. Never was.
128 Q. Did you carry water in there to put it out?
A. Yes, sir.
129 Q. How much water did you carry?
A. Oh, I could not answer that question any way positively, but that was I suppose 150 buckets that we used on that fire.
130 Q. What was the size of the buckets?
A. Buckets we have on the engine will hold about 3 gallons.
131 Q. And you used how many?
A. 150.
363 132 Q. That is, 450 gallons?
A. Well, you intend to make it that way. I will kind of explain. The boys being excited, lots of these buckets were not full.
133 Q. They were not?
A. No.
134 Q. Well, how many gallons, in your opinion, did they use?
A. You could safely say 250 or 300 gallons.
135 Q. How long did you remain there after that, after you carried that water in?
A. After we got the fire out?
136 Q. Yes.
A. Why Fisher said——

137 Q. I don't want what Fisher said—I asked how long you remained there after you put the fire out?
A. We were 10 or 15 minutes there, I suppose.
138 Q. Now, did you see the horses taken out?
A. Yes, I saw several of them taken out of the car.
139 Q. Didn't the negroes go in there and shove the horses out?
A. Yes, the negroes did.
140 Q. How many were taken out?
A. Five, I think.
141 Q. Only five?
A. Five.
142 Q. You said there were three left in the car?
A. Yes, sir.
143. Q. You took that car car down and back up again into this siding didn't you, to the shute—now how long did you remain at West Frankfort before you left there after putting that car in the shute?
364 A. We was there some considerable little time. We refilled our tank again. We had used considerable water out of our tank. We filled our tank and had to wait until Mr. Fisher came back from over the river, because our orders were changed.
144 Q. When you left there, did you leave those three horses in the car?
A. Yes, sir.
145 Q. And went on your way to Louisville?
A. Yes, sir.

Redirect examination:

1 Q. The knowledge that you had of the distance that you have been questioned about was acquired by passing to and fro on the road?
A. Yes, sir.
2 Q. Have you ever made any specific measurement of those distances?
A. No, sir.
3 Q. All the estimate of the distances you have given are simply your opinion as you have moved along the road?
A. Yes, sir.
4 Q. Moved more or less on the train?
A. Yes, sir.
5 Q. Do you pretend to say these estimates are correct?
A. No, sir.
6 Q. They are just gotten from your best judgment?
A. Just from passing along. Never measured any of them or saw any of them measured.
365 7 Q. You stated to Col. Franklin that you stayed 10 or 15 minutes after putting the fire out?
A. Yes, sir.
8 Q. You mean you stayed in the position where the car was when you stopped in order to put the fire out?
A. Yes, sir.

9 Q. And then you moved from that position to the shute with that car?

A. Yes, sir; after getting finished with this car we had to re-build our fire, everybody went away from around the car and the fire went out and we were some little while rebuilding our fire and getting in condition to move.

10 Q. Why was the fire gone out?

A. There was no one to attend to it.

11 Q. Where was the fireman?

A. He was working in that car most of the time.

12 Q. Who got down off that car first; you or the fireman?

Plaintiffs object.

COUNSEL FOR DEFENDANT: We won't quarrel about it.

BURNS, B. M., who having been first duly sworn, testified on behalf of the defendant as follows:

1 Q. What is your occupation?

A. Fireman on the L. & N. Railroad.

2 Q. Where do you live?

A. Louisville.

3 Q. How long have you been engaged in that occupation?

A. Six years the 19th of last month.

366 4 Q. Where were you on the evening of the 16th day of November, 1910?

A. On No. 29.

5 Q. And where was No. 29.

A. We left here and went on to Frankfort and went to Louisville.

6 Q. What is No. 29.

A. The freight run out of Lexington. Between Lexington and Louisville.

7 Q. About what time at night does that train leave here?

A. I think it left here about nine o'clock. About that time, the best of my judgment.

8 Q. About what time did that train leave Lexington on Nov. 17th, 1910?

A. I could not say what time. I should judge about nine o'clock to the best of my judgment.

9 Q. Where were you at the time the train pulled out?

A. On the engine.

10 Q. Your side is on which side of the engine?

A. Left side looking forward.

11 Q. Where were you for five or ten minutes before the train pulled out?

A. On the engine.

12 Q. What car, if any, did you have next to the tender on that engine?

A. I had an Arms Palace horse car.

13 Q. Do you know whose horses were in the car?

A. No, sir.

367 14 Q. Had you passed that car before you got upon the engine and while the train was standing there waiting to go out?

A. Yes, I got on the caboose that night before I was on the engine. When I went in the yard I got on the caboose step and was talking to the conductor awhile and then went on the engine and we passed right by the car as we went up to couple the engine.

15 Q. Did you see anybody around there?

A. No, sir.

16 Q. Anybody standing around?

A. If there was, I don't remember.

17 Q. Do you remember when the conductor passed up by that car?

A. No, sir.

18 Q. You left about nine—going where?

A. To Louisville.

19 Q. What sort of trip did you make from here to Frankfort?

A. Well, I could not just tell you exactly how long.

20 Q. I mean, was it a trip without any accident occurring?

A. Yes.

21 Q. Don't you know what time you reached the Union Depot at Frankfort?

A. Well, I could not say.

22 Q. About what time?

A. About eleven o'clock the best of my judgment; 10:45.

23 Q. How long did you stay at that depot?

A. I don't think we were there over three or four minutes.

24 Q. About 11 o'clock I believe you said when you reached the Union Depot?

A. 10:45 or 11.

368 25 Q. Where did you go and where did you make your next stop after you left the Union Depot?

A. Water tank at West Frankfort.

26 Q. Where is that water tank? About how far West of the West end of the bridge?

A. From the West end of the bridge?—Well, I could not say exactly.

27 Q. Well, give us as near as you can?

A. I guess about 70 yards, to the best of my judgment.

28 Q. How long did you stay there, taking water?

A. Well, I don't guess over five minutes taking water.

29 Q. About how far was it from that water tank, standing water tank, to the East end of that bridge?

A. To the East end?

30 Q. Yes, the end this way towards Louisville.

A. I could not say exactly. I would not like to say how far.

31 Q. Well, have you any impression as to what the distance is?

A. It would be about 15 or 20 car lengths.

32 Q. How is the water taken from the standing water tank into the tank of the engine?

A. There is a water spout and you pull that down into the manhole tank and then there is a rope you pull down to take water.

33 Q. Where is the end — the pipe you pull down from?
A. Goes in the man-hole tank.
369 34 Q. Does it go down into it? If so, how far.
A. Yes, the best of my judgment between 12 and 16 inches.
35 Q. Was there anything else attached to the water tank?
A. Yes, a notch.
36 Q. Does that extend above the level?
A. Yes, about 3 or 4 inches above the level of the tank.
37 Q. That is a notch that goes down into the tank?
A. Yes, sir.
38 Q. In taking water into that tank, about how far could a man hear it from the water tank?
A. I don't think he could hear it over 3 or 4 car lengths at the farthest.
39 Q. Could he hear it that far?
A. If the tank was empty, he might hear it that far. If it was not empty, he could not hear it that far.
40 Q. Could a man standing on the East end of the bridge that you have spoken of hear water coming into that water tank of the engine?
A. No, sir, I don't believe he could.
41 Q. After you had taken water, what did you do?
A. I could not just remember what, switching we done after we had taken water.
42 Q. Do you recall where you did go?
A. To the best of my judgment I think we set off two or three cars and then pulled down to the other end.
43 Q. Then what did you do?
A. I don't know how much switching we done there. I don't remember that.
370 44 Q. Where was this Arms Palace car at that time?
A. Next to the engine.
45 Q. Did any unusual accident occur there that night?
A. No, sir.
46 Q. Well, I mean the shape of a fire in a car?
A. Yes, sir, there was a fire in the car.
47 Q. Where was your car and where was your engine at the time you first had notice of that?
A. The car was attached to the engine when I first knew anything.
48 Q. Whereabouts were you, on what track, what part of the yard?
A. I think we were on the passing track.
49 Q. What first called your attention to the fact that there was a fire?
A. Mr. Mackey came back and asked me for a coal pick and told me to get a bucket of water.
50 Q. Had you heard, before Mr. Mackey came back, anybody hollering?
A. Yes, I heard Mr. Fisher hollering.
51 Q. What did he holler?
A. I don't know what he hollered. I was standing down in

the gangway and Mackey jumped off and came back and told me to get a coal pick and a bucket of water.

52 Q. At that time was your car standing still?

A. Yes, sir.

53 Q. What did you do when Mr. Mackey jumped down?

A. I got a bucket of water and run back there and when I got back there——

54 Q. We will get to that directly—had you seen any men at all coming up towards the engine when you heard Mr. Fisher hollering?

371 A. No, sir.

55 Q. Did any man go to the engine and holler to you about the fire?

A. No, sir.

56 Q. Could you have heard them if any man had come there?

A. Well, I expect I could if they had come about the engine I could have heard them.

57 Q. Was there any conversation between yourself and Mr. Mackey, between one or two men, stating in substance that the car was afire and to stop?

A. No, sir.

58 Q. Did you hear any conversation of that sort between anybody?

A. No, sir.

59 Q. Did you see any colored man come there?

A. When I went back——

60 Q. I mean at that time before you went back there?

A. No, sir.

61 Q. Did you hear any colored man say "The car is afire; stop it?"

A. No, sir.

62 Q. Did you or Mackey say "there ain't any fire there; if there is one, some fellow has started it with his cigarette?"

A. No, sir.

63 Q. Did such a conversation as that occur there?

A. No, sir; Before I went there it never did.

64 Q. Did it occur afterwards?

A. Mr. Mackey asked them how it caught fire; I believe; if I am not mistaken.

372 65 Q. Did you hear Mr. Mackey say, or did you say, "it is no such damn thing. If any such fire occurred, somebody did it with a cigarette?"

A. No, sir.

66 Q. Did you hear Mackey say, or did you say, "don't take those horses out of that car?"

A. No, sir.

67 Q. Were you in such a position to have heard such a conversation as that while you and Mackey were in the engine?

A. Yes, if they had come up and made this remark I was in a position to hear them.

68 Q. Well, now, after Fisher told you all, or hollered, that the car was on fire, what was done then?

A. We stopped and Mackey went back there.

69 Q. Was there any motion of the car?

A. They cut it off and run it out on the main track, I believe.

70 Q. When Mr. Fisher hollered to you, was the train in motion or standing?

A. I could not say whether in motion or standing still.

71 Q. Then, after Mr. Fisher did tell you the car was on fire, what did you do?

A. Well, Mr. Mackey run back where I was standing in the gangway on the right side of the engine. He came back and asked me for a coal pick and told me to get a bucket of water.

72 Q. Was that done before or after the car was cut loose?

A. After the car was cut loose.

73 Q. After he hollered to you what was the next thing that was done? Did you uncouple the car?

A. Yes, uncoupled the car and they run down the main track to a post.

373 74 Q. How far did you go?

A. I judge about 100 yards.

75 Q. How long did it take to uncouple that car? To move it with the engine to the point where you stopped about 100 yards you say?

A. I judge between 3 and 5 minutes.

76 Q. What was the object in getting that car moved out?

A. To keep it from setting any of the other cars on fire.

77 Q. After you had moved that car and got it to a standstill what did Mr. Mackey do then?

A. He jumped off the engine and run back there and he came back and asked me for a coal pick and told me to get a bucket of water and I handed him the coal pick and got a bucket of water and run back there with it.

78 Q. And what did you do with it?

A. I don't remember. I believe I handed the bucket of water to Mackey and when I came back there the negroes were just then coming out of the car.

79 Q. What door were they coming out.

A. Out the North door on the right side.

80 Q. Which do you call the North door, the one next to Lexington?

A. Yes, the one next to Lexington. The one we call the North door.

81 Q. How many negroes did you see?

A. There was—I saw three.

82 Q. Altogether, there?

A. Yes, sir.

84 Q. Did all three of them come out of that door? Did you see?

A. I don't remember whether they did or not.

374 84 Q. You saw three standing there but don't know whether they came out of the door?

A. N——

85 Q. What did they do?

A. They did not do much of anything.

86 Q. Describe to the jury what they did do?

A. When I went back there I jumped up in the car and some more of them followed me up, I don't know who it was, and they started to get out some blankets and went in there. I told them to let us get this fire out and try to save those horses. And so there was a tub there with some buckets in it and I jumped down and got three or four buckets, and put one man on the tank and the rest of them carrying water to me. I don't remember who it was I had on the tank.

87 Q. You mean the tank of the engine?

A. Yes, sir, and I went and got back up in the car and the negroes were not doing nothing much. I cursed them and told them to help do something and try to get that fire out, and save them horses. So when we went in there back in that South end where the fire was you could not see nothing at all in there. Where I seen some fire I threw two or three buckets of water and came out of the car and got a coal pick; when I seed it was on the South end of the car I busted the door open there and got three or four buckets in there on the fire and then I went away on the West side—South side rather—and bust the door open there and got some more water on some fire that was on that side. And then I went back in the car and went in there and throwed some water on the fire just wherever I could see it as long as I could stay in there with the smoke; I would step back and get my breath and go back again until I got the fire out.

375 88 Q. Where was the fire when you first saw it?

A. In the South end of the car. That is, on the South side of the partition that is in the car.

89 Q. Was it in the aisle or not in the aisle?

A. Well, it was all over in there.

90 Q. Was it in the stalls?

A. Yes, to the best of my judgment. There was fire right behind a horse, at his heels, when I busted the door open and first thing I done was to get some water and put that fire out at that horse's heels.

91 Q. Which corner of the car was that? You said it was in the South end—which corner?

A. This was in that corner just right opposite to the door, to the best of my judgment.

92 Q. You mean by the side of the door there is an aisle running across?

A. Yes, there is an aisle going through the car.

93 Q. Now, which side of that aisle was the fire in you saw down there?

A. On the right side going south. I went in the North end of the car and as I went through the fire was on the left side.

94 Q. In which corner down there was the fire chiefly?—how many horses were down there in that end of the car, right next to the end of the car?

A. To the best of my judgment, I believe three or four, I could not say which.

95 Q. Now, there are two corners to that car, ain't there, inside—say this is the side of the car, here is a corner and there is a corner over there, ain't it?

A. Yes, sir.

376 96 Q. There are two corners there; which of these corners did you see the fire in?

A. Say this is a horse car—(indicating on witness stand)—and there is a partition through here and then there is an aisle comes down on this side and there was a door or something where you go in there one end to the other and go through that car to this aisle. To the best of my judgment, the fire was half way between the South end of the car and this partition.

97 Q. Well, now is there an aisle in there and steps between the stalls?

A. Yes.

98 Q. Well, now was there any fire in there or not.

A. In the aisle, yes sir.

99 Q. Did you see the lantern in there?

A. Yes.

100 Q. Where did you see the lantern?

A. I saw the bottom of the lantern laying on the floor of the car and the top was hanging up on something, I could not see what it was hanging on, a nail or what.

101 Q. What part did you see on the floor?

A. The bottom of the lantern.

102 Q. Was that on the stall or aisle?

A. In the aisle. It was not exactly in the aisle, about half way between the partition and the South end.

103 Q. Now, with reference to where that part of the lantern that you saw hanging up there, was it beneath it or where?

A. To the best of my judgment just under where the lantern was hung.

104 Q. How was it when you went in, smoking or not?

A. When I first went in, you could hardly get in; smoking.

377 105 Q. Who got these horses out?

A. The negroes assisted in getting them out, and the trainmen.

106 Q. How many did you get out?

A. Five.

107 Q. What time of night was it when you got the horses out, about as near as you could get to it?

A. About as near as I could get to it, to the best of my judgment between 12 and 11.

108 Q. Could you see distinctly?

A. No, sir.

109 Q. Did you examine those horses?

A. I did not.

110 Q. Did you see what condition any of them was in?

A. No, only the sorrel horse I noticed he was burned pretty bad.

111 Q. Where was he burned?

A. On the hip; his nose was burned bad too.

112 Q. Which hip was he burned on?
A. I think it was the left hip, to the best of my judgment.
113 Q. Where was it you examined him, in the car or down on the ground?
A. He was in the car; that horse was left in the car.
114 Q. Did you see any of the horses out of the car?
A. Yes, sir.
115 Q. Did you examine any of them?
A. I did not.
116 Q. Did you see what the condition of any of them was?
A. No, sir.
378 117 Q. Could you tell at all?
A. Only one horse, that one the negroes led over the switch and crippled him and was the one that I noticed lame.
118 Q. You did not examine any of the others to see if they were burned or not?
A. No, sir, but I noticed that horse was lame after he got that foot out of the switch and went away.
119 Q. That was the only one you could see?
A. Yes, sir.
120 Q. And you made no examination out there to see whether any of them were burned or not?
A. No, sir.
121 Q. How long did it take you all to get those horses out of that car after you began to do it?
A. I could not say exactly.
122 Q. As nearly as you can?
A. May have taken us between 20 or 30 minutes altogether.
123 Q. What was done with the horses that got out of the car?
A. I believe they took them over to Frankfort to the livery stable.
124 Q. Did you go to the livery stable?
A. No, sir.
125 Q. When they left the car in which direction were they taken?
A. Taken back to Frankfort. Taken North.
126 Q. Who went with them?
A. I could not say; I believe Fisher.
379 127 Q. Which way did Fisher go after you got the horses out of the car?
A. With the horses?
128 Q. Did he go with the horses, and in what direction did he go?
A. He went back over in Frankfort.
129 Q. How long was Mr. Fisher gone? Do you know what time he came back?
A. No, I do not.
130 Q. After you had gotten those horses out, what did you do with that car?
A. They put them in that stock shute.
131 Q. What did you do. Leave it there or take it?
A. Leave it there.
132 Q. What became of the engine?

A. That went back on our train, I believe, I don't know whether we done any switching after we coupled on to the engine or not.

133 Q. How long did that take you all to stop there and get that fire out and the horses out?

Plaintiffs object; which objection is overruled by the court; to this ruling of the court plaintiffs except.

A. Between 20 and 30 minutes, the best of my judgment.

134 Q. To stop and get the fire out?

A. Yes, and get the horses out. You understand that was the horses we got out of the car, the five horses we got out of the car.

135 Q. What was inside of that car?

A. Well, there was blankets, hay and horses, about all I seen in there.

380 136 Q. Was any hay in there?

A. Yes, there was hay in there.

137 Q. See any tubs or buckets?

A. Yes, I took the tub and buckets out.

138 Q. Do you recall how many tubs and buckets there were?

A. To the best of my judgment one or two buckets and three or four tubs.

139 Q. See any oats in there?

A. I don't remember whether I saw any or not.

140 Q. Now what was the condition of each of those darkies as to their being sober or not sober?

A. Well, I smelt liquor on their breath. Outside of that I could not tell whether they were drunk or sober.

141 Q. Did you smell anything on the breath of each of them?

A. I don't remember whether I did or not; they both were around there quite close and I smelt liquor on their breath and that is all I could tell about it.

142 Q. Did you hear them talk any?

A. I heard them say that the boss would be awful mad when he found out those horses were burned up.

143 Q. Mad with what?

A. I don't know whether he meant them or the company.

144 Q. Was there any lantern in the front part of the car at the Lexington end?

A. No, I never saw any lantern there.

145 Q. Did you see it at any time hanging up or down on the floor?

A. The only lantern I saw was the one I just got through telling you about.

381 146 Q. Did you examine and see whether there was any lantern at the Lexington end of the car?

A. No, I did not.

147 Q. Did you see either of those darkies smoking around there?

A. No, sir.

148 Q. Were you on that engine all the time you were doing the switching in Frankfort?

A. Yes, sir.

149 Q. Tell the jury whether or not there was any unusual jarring?
A. There was no unusual jarring that night, that I remember of.
150 Q. Any bumping of the cars or striking of the cars?
A. No, sir, no unusual bumping or striking of the cars, that night, that I remember of.
151 Q. Do you recall whether the train had been made up or what you were about to do, when you first heard from Fisher that there was a fire in that car?
A. I don't remember whether the train was made up or not.
152 Q. Was it moving or standing?
A. When he first discovered the fire?
153 Q. Then what was the train doing?
A. When he first discovered the fire I believe we was passing him and he was checking up the train and he hollered at Mackey.
154 Q. You can't tell whether the car was in motion or not?
A. I believe we cut out of the side track on to the main track, to the best of my judgment.
155 Q. For what?
A. To back up on the train, or doing some more switching, I don't know which.
156 Q. You don't recall just whether the train had been made up or not?
A. No, sir.

382 Cross-examination.

1 Q. When does the conductor check up his train with reference to the time of leaving? Tell us.
A. Well, he checks up here before he leaves and then when that switching was done he generally gets the numbers of the car and the stalls.
2 Q. Is that the last thing he does before the train leaves after the switching is all completed?
A. Sometimes does, but I have seen him get them as soon as the engine is coupled on.
3 Q. How did he do that night at Frankfort?
A. I could not say how he done it that night.
4 Q. Didn't you just undertake to tell the jury that you were passing him and he was checking up the train in preparation of leaving?
A. Yes, I believe he was.
5 Q. Hadn't you finished your switching and——
A. I could not say whether we had or not.
6 Q. You don't know whether your train was made up and ready to leave, or not?
A. No, sir.
7 Q. How long before that fire was discovered before you had coupled on to another car?
A. Before it was discovered.
8 Q. Is the last coupling you made before this fire was discovered—how long was that before?

A. I could not say how long it was.

383 9 Q. You say when you got off your caboose and went back to the car and got in that you got some buckets?

A. Yes, sir.

10 Q. Whose buckets were they?

A. They belonged to the man that owned the horses, I guess they were.

11 Q. And those are the buckets you used?

A. We had one tank bucket on the engine that I got the first bucket of water in.

12 Q. What was the size bucket you got out of the car?

A. I could not say what size they were.

13 Q. What was the size of the one you had on the engine?

A. About 2½ gallons, or 3 gallons bucket.

14 Q. How did the size of those you got out of the car compare with the one you had on the engine?

A. These buckets we got out of the car were bigger buckets at the bottom than ours were. Our bucket would set on the inside of one of them, I believe.

15 Q. And you used not your bucket but the buckets that came out of the car?

A. We used all of them.

16 Q. You had one? How many did you get out of the car?

A. I think there were three or four. Something like that.

17 Q. How many of you used those buckets?

A. Well, I don't know. I was in the car; all of them were carrying water.

18 Q. You say that car, the end of it towards Louisville and beyond the partition, was afire, everything in there?

A. Yes, burned all over in there, best of my judgment.

19 Q. And all of it was charred?

A. I never noticed particularly whether they were or not. But there was fire all around; at first I could not get in any further than the partition when I first started in the car. The partition

384 was as far as I could get to throw water in and then I would back out and get my breath again and then go in again.

20 Q. So, when you first got in there to throw water, everything was on fire?

A. Yes, sir; fire everywhere.

21 Q. Then it is not a fact that the conductor was there and said the fire was practically extinguished before you went back to get more?

A. The conductor did not extinguish it at all, there was a lot of water carrying in there.

22 Q. What time, in your judgment, was it that this fire occurred?

A. About 11:30, best of my knowledge.

23 Q. And what time was it when those boys left with the horses to go back to Frankfort with them?

A. I guess between 12 and 1 o'clock.

24 Q. At what time, please tell the jury there, that you smelt liquor on the breath of those boys?

A. When I told them to go around and help to get that fire out.

25 Q. And that was before you got in there at all?

A. I don't remember whether it was before or not, I would not say.

26 Q. Which of the boys was it that you smelt liquor on, the yellow one or black one?

A. I could not say. Both were standing right close together.

27 Q. How close did you stand towards them?

A. I guess I was in two or three feet of them at the time.

385 28 Q. And at that time you smelt this liquor?

A. Yes.

29 Q. What kind of liquor was it you smelt?

A. Whiskey.

30 Q. Whiskey?

A. Yes.

31 Q. Ain't you mistaken? Wasn't it gin?

A. The way whiskey *whiskey* smelled to me.

32 Q. Did it have a mixture of gin in the center of it?

A. It did not.

33 Q. Did you notice any beer on either of them?

A. No, sir.

34 Q. It was whiskey—how many horses did you get out of the car?

A. Five.

35 Q. And only five horses were taken out of that car?

A. That is all that were taken out. The five horses. That is all up until we placed the car at the stock shute. I don't know whether they took these out or not.

36 Q. Well, the boys had gone with those five horses before you put the car up to that?

A. Yes, they went away, with the five horses before we put the car at the shute. And the three were left in the car.

37 Q. Where were they in the car, when you left them?

A. I believe they were in the South end toward Louisville.

38 Q. All three of them?

A. Yes.

39 Q. You know there were three left in there when you left them?

A. There were three left in there when we left the car at the stock shute.

386 40 Q. How long was that after the boys left with the horses?

A. I could not say how long it was.

41 Q. What did you do after you put that car at the stock shute?

A. We left it there and went back, and I don't remember whether we done any more switching after that or not.

42 Q. What other than switching did you do after you left that car at the stock shute?

A. I just told you I didn't remember whether we done any more switching after that or not.

43 Q. I asked you if you did anything else besides switching?

A. I don't remember whether we went back and switched or went on the train, I would not say.

44 Q. Didn't you just back out on the main track and couple up with the other car of the train?

A. I could not say whether we did or not.

45 Q. Did you go back up to the bridge with your engine after this fire?

A. I don't remember.

46 Q. Don't you know you backed up to that water stand and backed away again?

A. No, Sir, I do not.

47 Q. Do you know you did not?

A. No, sir, I don't know whether I did or not.

48 Q. You are the man, when you back up to take water, that handles that crane?

A. Yes, sir.

49 Q. Don't you know now that you did back up there and take the crane down.

A. No, sir; I would not swear I did or did not.

387 50 Q. You don't know?

A. No, sir.

51 Q. You don't know much about what was done there that night in the car?

A. I guess I do.

52 Q. Tell us what you did?

A. It ain't my place to know every switch that is made there. I know we did the switching there. That is all I know.

53 Q. Well, if you know about it, tell us?

A. I have told you that I knew we were switching there but what switching they were doing I don't know. It ain't my place to know.

54 Q. You are on the engine, ain't you?

A. Yes, sir.

55 Q. And when they are switching, you go with the engine, don't you.

A. Yes, sir.

56 Q. And you don't know what switching was done?

A. No, I don't know what switching was done.

Redirect examination:

1 Q. Is it your duty, as fireman, to keep a record of the switching that is done?

A. No, sir.

2 Q. Is it the duty of any fireman to do that?

A. No, sir.

Plaintiffs object.

3 Q. And did you or not charge your mind with the switching that was done there that night?

A. No, sir; never did.

388 SHANNON, Dr. J. T., who having been first duly sworn testified on behalf of the defendant as follows:

1 Q. I will ask you whether all those animals were burned or singed, or injured by fire so as a person in a night such as that, without special examination, could tell whether they were singed or burned?

A. Well, some of them were just slightly singed; some burned.

2 Q. Assuming that the light that existed that night was what it was, and those horses were taken out of the car and gotten out, I want to know from you whether or not those that were simply singed, as you say singed, a man without examination of them could tell they were burned?

Plaintiffs object.

The COURT: I will let him answer that; I have some doubt about the competency of it.

COUNSEL FOR DEFENDANT: I will put it more specifically.

3 Q. Assuming it a fact that the fire occurred at night, about 10 o'clock, on November 17, 1910, that there was some dim light (not especially dark), could a man, without special examination, or particular examination of these horses that were gotten out of the car—which horses you say were only singed, tell that those horses were burned or badly singed without a particulary or special examination of them?

A. I didn't see the horses at twelve o'clock, Mr. Thornton.

4 Q. Well, was the extent of the singeing such as a man in the middle of November could tell they were injured, without special examination?

A. No, sir; I could not say.

389 5 Q. Didn't you just tell me in there you didn't specify what time?

A. I did not see the horses until about four o'clock in the morning, and I used a light to go down there on the machine.

6 Q. Were the injuries of those horses, which you say were singed, such injuries as that a man about 12 o'clock of a night in November (it wasn't dark) without special light, could tell whether they were burned as they could jump out of the car and move off?

A. I think you will have to examine them and see them.

Cross examination.

1 Q. Assuming that the following facts were true—that those horses were in a car, an Arms Palace car, with a partition door in the center of that car, with the end of that car, toward Louisville, all aflame inside, with the door in that partition open, hay burning in that car, and the light coming through that door, that the railroad conductor with a lantern was among those horses, that he had a light while those horses were being taken out of the car, and a man outside of the car, with one car door open, could have observed, being about with a lantern, and with the light, that those horses were singed?

Defendant objects; which objection is sustained by the court.

2 Q. I will put it this way; that a man about there with a lantern, this stuff, hay etc, burning in one end of the car and the light from that, and the fire so great that a man could not get further than that door to throw a bucket of water in, the horses being brought out of the end of the car, could a man standing about there have seen that these horses were singed?

390 Defendants object; which objection is overruled by the court; to this ruling of the court defendant excepts.

A. No, I think he would have to examine them to find out.

3 Q. All the horses you saw at the livery stable, were any of them so burned that they could not discover that they were burned without close examination of the extent of their injuries?

A. I don't exactly understand your question.

4 Q. The horses which you saw at the livery stable, and which you have described, some as burned and some as singed, could they have been discovered that night any of those horses were burned, under the circumstances?

A. It depends how close you would be. There on the ground?

5 Q. I thought all the horses were all jumped out of the car?

A. Just jumped out.

6 Q. You could not see very much difference? You testified yesterday as to how much those horses were burned.

A. Yes, sir.

Re-direct examination.

1 Q. And on that occasion you testified, I believe, that Jack Point was not burned, but was made lame by some means?

A. One of them had a very ragged cut in jumping out of the car.

2 Q. And that one was not burned or singed?

A. No, sir.

(It is agreed by counsel that a question in rebuttal shall be asked the witness in order that he will not be asked to return to tes-
391 tify.)

1 Q. Did you see Chester Frakes and Go Devil, as they call him, when you were there with those horses that night after this fire?

Plaintiffs object, not as to its being out of order, but as to its competency. Said objection is overruled by the court.

A. Yes, I saw them.

2 Q. Were they drunk or sober?

A. Sober.

Recross examination.

1 Q. Where did you see them?

A. I led them out of the livery stable first and then we went away to the car.

2 Q. What time was it you met them?
A. About 4 o'clock the morning of the 18th.
3 Q. That was the first time you saw them?
A. Yes, sir.

LEASOR, W. P., who having been first duly sworn, testified on behalf of the defendant as follows:

1 Q. Where do you reside?
A. 126 Cox Street, Lexington.
2 Q. What is your occupation?
A. Brakeman on 29 and 30 L. & N.
3 Q. What are Nos. 29 and 30?
A. Freight trains on the L. & N.
4 Q. Running from where?
A. From Lexington to Louisville and from Louisville to Lexington.
392 5 Q. What was your occupation on the 17th day of November, 1910?
A. Well, some call it brakeman and some flagman. They are the same thing.
6 Q. Do you remember whether you were engaged in your duties or not on this train on that night?
A. What were I doing?
7 Q. Yes, were you on duty——
A. Yes, sir.
8 Q. On what train?
A. 29.
9 Q. Do you remember where that train started from?
A. Yes, sir; from Lexington.
10 Q. Can you tell what time of day it started out?
A. It left here right around nine o'clock, as well as I remember.
11 Q. Do you know whether it had any horse car attached to that train?
A. Yes, sir, a horse car next to the engine.
12 Q. Did you see any colored attendants?
A. A couple of darkies; yes, sir.
13 Q. Where did you see them?
A. One in the horse car and one on the ground.
14 Q. How long was that you saw them before that train started out?
A. It was after the conductor had checked the train. It must have been about ten or fifteen minutes. He had gotten those orders.
15 Q. Did you have any conversation with them yourself?
A. No, sir.
16 Q. Did you hear any conversation on their part?
A. I did not hear them talk to anyone. Didn't see anyone down there, but these colored fellows, I seen them.
393 17 Q. Can you state whether or not either or both of them was under the influence of liquor?
A. It looked that way to me.

18 Q. Describe to the jury how it looked to you? What they did?

A. Well they was hollering and cutting up like fellows you see that are full of booze.

19 Q. How did they move?

A. One of them was standing down on the ground, kind of staggering agin the car. The yellow one was standing on the ground, the black man was in the door.

20 Q. Describe those two men?

A. One a light darkey, and the other darker than him.

21 Q. Have you ever seen many drunken men?

A. I have seen quite a few.

22 Q. What do you mean by "quite a few"? Do you mean you have seen many?

A. Yes, I have seen a good many.

23 Q. I will ask you whether, in your opinion, either or both of those men were drunk?

A. Well, they were drunk.

24 Q. Did you see either of those men smoking?

A. I seen the darkest one smoking a cigarette.

25 Q. Whereabouts?

A. Standing right by the door of the L. & N. yards.

26 Q. Door of what?

A. Car door.

27 Q. Which door?

A. Left-hand side going South.

28 Q. There are two side doors, I believe?

A. Well, the rear door.

29 Q. The one next to Louisville or Lexington?

A. Lexington.

394 30 Q. Did you go on that train?

A. Yes, sir.

31 Q. Did you go with it to Frankfort?

A. Yes, sir.

32 Q. Do you know what time of day you got to Frankfort?

A. No, sir; I don't. But it must have been right around eleven o'clock. I could not state what time it got there. Only what time we left.

33 Q. Did you go to West Frankfort with it?

A. Yes, sir.

34 Q. Do you recall a fire occurring over there?

A. Yes, sir, there was a fire over there in the horse car that we had.

35 Q. What was the first notice you had of that fire?

A. Well, of course I was the hind man and was going over the train and got there to the cut of cars that we were to pick up, I heard somebody holler "fire," but who it was I could not say. And then I heard somebody beat on something, I don't know what it was, but I found out after I got there that they were beating on the door of the car they had the horses in.

36 Q. How far were you from the point nearest that noise, when you first heard it?
A. Right around 18 car lengths.
37 Q. When you heard that strike on the door?
A. The striking on something, I suppose the door.
38 Q. Could you hear what the man who was hollering said?
A. No; only I heard him hollow there was fire.
39 Q. Then what did you do?
395 A. I went on down there where they were at, and by the time I got there they had knocked the door in. I suppose they were beating on the door.
40 Q. When you got there was the door open?
A. Yes, sir.
41 Q. Did you see any colored man there?
A. Yes, sir.
42 Q. Where was the colored man when you got there?
A. Well, I remember the darkies. One was getting out of the door. The yellow one was on the ground leading two or three horses.
43 Q. After you got there were any of the horses out on the ground, or not?
A. I think there were three of them.
44 Q. Do you know how many were gotten out of the car altogether?
A. Five.
45 Q. Where were they? All still in the car, or did you say they had gotten out when you got there?
A. Yes, three had gotten out and the other two were in the car.
46 Q. When were they gotten out?
A. Right away.
47 Q. Do you know who helped to get those horses out?
A. No, I could not tell pos-tively, the whole bunch was working.
48 Q. Did you go down to help to work?
A. Yes.
49 Q. What did you do?
A. I helped pull the last horse out with a halter.
50 Q. Did you go in that car?
A. No, sir.
51 Q. You don't know what condition was in there?
396 A. No, I could not state what the condition was. I could see in the door, I could not state what was going on in the back end. There was several in there.
52 Q. Did you see the horses taken away from there?
A. Yes, sir.
53 Q. Do you know who took them away?
A. Colored boys, I believe.
54 Q. What kind of night was it there, as to being light?
A. Well, it was not very dark. It was not very light. As well as I remember, there was a little sniff of snow on the ground.
55 Q. What time was it you saw those horses gotten out?

A. We got to Frankfort right around eleven o'clock. I could not state what time that was.

56 Q. Who were the other flagman, or brakeman, on that train?

A. Cobb and McKenna.

57 Q. Did you see Mr. Fisher about there?

A. Yes, sir.

58 Q. What became of Mr. Fisher?

A. He was down there with the car.

59 Q. Do you know what became of him after those five horses were gotten out of there?

A. He went back to Frankfort with a message.

60 Q. Did you see him when he got back?

A. Yes, sir.

61 Q. How long was he gone

A. Must have been gone about 30 or 35 minutes.

62 Q. How long was it when you got back, if you can tell?

A. It must have been close upon one o'clock by the time we got away from there.

397 63 Q. When you first heard the cry of fire, do you remember whether the train was in motion or stationery?

A. Well, the train was standing still, I guess.

64 Q. Not what you guess?

A. Well, I was back about 18 car lengths.

65 Q. You were on the top of the car, were you?

A. No, I was on the ground.

66 Q. Can you recall when you first heard the call of fire, whether the train was in motion or was standing still?

A. Well, I don't remember now.

Cross-examination:

1 Q. You told the jury that one of those men was smoking? Was it the black one or yellow one?

A. The black one.

2 Q. Where was he when you saw him smoking?

A. Standing by the car on the ground.

3 Q. That is the only time you saw him smoking?

A. Yes, sir.

4 Q. You didn't see him smoking inside of that car?

A. No, sir.

5 Q. You didn't see the other man smoking at all?

A. No, sir.

6 Q. How long before that car started was it before you saw the boy smoking standing on the ground?

A. Must have been 15 minutes.

7 Q. When was it you saw them there when they appeared to be drunk, with reference to the time the car started? How long before the car started, would you say?

A. About 15 minutes.

398 8 Q. That is the time that this boy was smoking?

A. Yes, sir.

9 Q. Where were you when you saw them?

A. I was walking up from the train.
10 Q. You said the boy was smoking a cigarette?
A. Yes, sir.
11 Q. Do you know anything about the length of time it takes to smoke a cigarette?
A. I don't know; some smoke them quicker than others.
12 Q. Didn't take as much as 15 minutes, did it?
A. I don't understand that. He was smoking it that long.
13 Q. What I mean, you saw him smoking it 15 minutes before the car started?
A. Yes, sir.
14 Q. You cannot say he was smoking that cigarette when the car started?
A. No, sir.
15 Q. What was it that next you saw?
A. They were giving a hollering and talking.
16 Q. Who were they hollering and talking to?
A. One another.
17 Q. Did you see anybody else about that car?
A. No, sir.
18 Q. Did you see Mr. Ireland about that car?
A. Mr. Who.
19 Q. Do you know this man Mr. Ireland? (pointing to Mr. Ireland.)
A. No, sir; I didn't see him at all. I never seen him until now.
20 Q. It was about 15 minutes before the car stopped when you say you heard this boy holler?
A. Yes, sir.
399 21 Q. What were they doing that made you think they were drunk?
A. Making all that fuss.
22 Q. What did they say when they were making that fuss?
A. That has been too long ago.
23 Q. Did you hear them say anything that was foolish?
A. I could not state that now.
24 Q. How close were you standing together?
A. Well, he was kind of in the door, the yellow one, and the black one standing on the ground.
25 Q. How far were you?
A. I walked around the train and got right by them.
26 Q. How loud were they hollering?
A. They were not hollering so awful loud.
27 Q. Is it not a fact they were just talking?
A. They were talking loud.
28 Q. When you heard them doing the talking, how far were you away from them?
A. I walked right by the car, same as walking along here.
29 Q. You didn't see them after that? Both got into the car?
A. No, sir.
30 Q. Didn't see them any more until you got to Frankfort?
A. No, sir.

31 Q. Where were you at Frankfort when you heard the noise or cry of fire?

A. Right around 18 car lengths from the engine.

32 Q. When you were in the yards here you said one was standing in the door, and the other on the ground. Now, which door was it that the boy was standing in?

A. The rear car door on the left-hand side, going south.

400 33 Q. As you go towards Louisville?

A. Louisville.

34 Q. Were they facing towards the Louisville door on the left hand side?

A. Yes, the rear door on that side.

35 Q. The door was open, was it?

A. Yes, sir.

36 Q. With the boys standing in it?

A. Yes, sir.

37 Q. Any what other doors open?

A. I never noticed any.

38 Q. What part of that train did you ride going to Frankfort?

A. In the rear end.

39 Q. In the caboose?

A. Yes, sir.

40 Q. Ride in that position clear to Frankfort?

A. Well, I don't remember. I don't remember now whether I got off at Cliffside or not.

41 Q. Do you know how many switches you made before you got to Frankfort?

A. I don't recall any.

42 Q. After you backed this car on and loaded these horses in the Lexington yard, did you make any switches before you got to Frankfort?

A. I don't know.

43 Q. After you got to Frankfort; did you stop before you got to the yards in West Frankfort?

A. In the street.

44 Q. How long did you stand there?

A. Not over 8 or 10 minutes.

401 45 Q. Did you come out of the caboose and walk up and down the train?

A. Could not get through the tunnel.

46 Q. You stayed back in the caboose?

A. Yes, I stayed back on the hind end.

47 Q. I will ask you when this cry of fire occurred? Where were you?

A. I was about 18 car lengths from the engine.

48 Q. Where were you there? What were you doing?

A. I had got down from the rear end of my train that distance. And, as well as I remember, I cut off four cars off the bunch that was on the — track.

49 Q. Before this cry of fire, that you heard, how many connec-

tions had been made there? Separations and running around on the switch?

A. Well, I don't remember. You see I was not over there. We might have made a switch or two that I don't know.

50 Q. How many cut offs did you make?

A. I cut off one.

51 Q. That was on the switch, wasn't it?

A. That was on the passing track.

52 Q. Did you cut off the caboose before this freight train got into the yards there at West Frankfort, and before the train went into the yards in West Frankfort?

A. I cut off when it stopped at West Frankfort.

53 Q. Where did you stop there?

A. Well, the train stopped to clear the South switches there at West Frankfort, and to do their work.

54 Q. You cut off then?

A. Yes, sir.

402 55 Q. Did you cut off any more before you heard this cry of fire?

A. No, sir.

56 Q. After it stopped there, what movement did it next make?

A. Just as I said before, they had work to do down there. Had some cars to back up.

57 Q. Do you know how many cars they had to back up?

A. No, sir.

58 Q. Was it necessary to back up cars?

A. To go down to Frankfort we have cars to pick up. We have to cut that engine off, the engine and so many cars.

59 Q. To couple into them you have to back up to them, do you not?

A. Yes, sir.

60 Q. And hitch on to them?

A. Yes, sir.

61 Q. And how many cars were hitched on there, taken on?

A. Fourteen.

62 Q. Were those cars all together or hitched all together, or were they standing around on the different positions of the switch?

A. They were together.

63 Q. The whole train of fourteen cars made up there?

A. They were together.

64 Q. Did you make that connection when these fourteen cars were put in this train of cars? Did you fasten them together?

A. No, sir; I did not.

65 Q. You don't know who did that?

A. No, sir.

66 Q. With reference to the time you heard that cry of fire, had you made the connection that you speak of there, or cut off the connection?

403 A. I was taking out the rear end, fourteen hind cars, that were in the passing track, and as I cut these cars off, and

when they coupled those cars and started out with them, I heard the cry of fire.

67 Q. They had been cut off, had they, or hitched on to this other car?

A. They had coupled on to them.

68 Q. To do that they had to back up to them?

A. Yes, sir.

Redirect examination:

1 Q. Did you hear any unusual crash or jar or knock on the cars?

Plaintiffs object; which objection is overruled by the court; to which ruling of the court plaintiffs except.

A. No, sir, there was not.

Recross-examination:

1 Q. I forgot to ask you are you still in the employ of the L. & N. Railroad?

A. Yes, sir; the same position I held then.

COBB, J. L., who having been first duly sworn, testified on behalf of the defendant as follows:

1 Q. Where do you live?

A. 1509½ W. Broadway, Louisville.

404 2 Q. What is your present occupation?

A. Brakeman on the L. & N.

3 Q. Sometimes call that flagman, don't they?

A. Yes, sir, on the passenger trains.

4 Q. What was your occupation on the 17th day of Nov. 1910?

A. I was brakeman on the freight train.

5 Q. What was the number of the freight train?

A. 29.

6 Q. What was the run of the train?

A. From Lexington to Louisville.

7 Q. Do you recall when the train left the yards of the L. & N. Railroad at Lexington?

A. I don't remember the exact time that night. Something—possibly,—it was a little past leaving time.

8 Q. Do you think you were a little behind the regular leaving time?

A. I think so; I am not sure.

9 Q. What is your recollection?

A. I think we were a little late getting out of here. I think we left here at that time, at 8:40 schedule leaving time. I could not say how late it was, but not so much as an hour I don't think.

10 Q. Do you recall whether or not there was an Arms Palace horse car on that train?

A. Yes, sir; there was.

11 Q. Do you recall the position of that car?

A. Right next to the engine.

12 Q. Did it leave Lexington yards in that position?
A. Yes, sir.
13 Q. Did you see two colored men that evening who were the attendants on the horses in that Arms Palace car, before you left Lexington?
A. Yes, sir.
405 14 Q. Where did you see them?
A. In the freight yards standing by the car door.
15 Q. How close to them were you?
A. I was standing right against them.
16 Q. Which car door were they standing next to?
A. They were standing over on the right-hand side as you go to the engine.
17 Q. On the right hand side of the car as you go towards Louisville?
A. Yes, on the engine's side.
18 Q. Which one of those doors was he near, nearest Lexington or nearest the engine?
A. I could not say about that; which door they were standing at.
19 Q. From what you saw and heard of them that evening, could you say whether or not they were under the influence of liquor?
A. They were; yes, sir.
20 Q. How could you tell that?
A. From their talk to the conductor, when he asked them for their contract they refused to give it to him and talked in a very unbecoming manner to him and evidently they were under the influence of the liquor. They did not talk sensibly.
21 Q. Do you recall any of the language they used?
A. No, only they refused to show him their contract.
22 Q. How long was that before the car started?
A. Well, I could not say exactly, but it was not over 30 minutes anyway.
406 23 Q. Did you go with that train down to Frankfort?
A. Yes, sir.
24 Q. Do you recall what time you got up to the Union Depot down there?
A. Something about eleven o'clock, possible a little after.
25 Q. How long did it stop there?
A. Well, about five or six minutes, I guess.
26 Q. Where did you go then?
A. Pulled through to West Frankfort and pulled up to the water tank and taken water.
27 Q. Do you recall they did stop at the water tank?
A. Yes, sir.
28 Q. Could you say about how many cars you had on that train?
A. No, I don't remember how many cars there were.
29 Q. Where did you go when you left the water tank?
A. We pulled on down to the West Frankfort yards there and then they commenced switching.
30 Q. Well, did anything unusual occur in that yard?

A. No, sir.

31 Q. I mean about the fire. Did any fire take place there?

A. Yes, sir, the car caught fire while we were switching.

32 Q. Was the train made up?

A. The train was standing on the main track. They pulled down there and left the train standing on the main track, cut some cars off and began switching. I could not say how many they cut off for I was on the top of these cars and passing the signal. There is a curve there and if you have many cars an engineer cannot see the signal.

407 33 Q. Did you see any alarms preceding the fire—any noise or anything knocking——

A. When the conductor discovered it I heard him holler "fire".

34 Q. Do you remember where the train was standing, that car and engine was standing, at that time?

A. We had backed some cars into the passing track.

35 Q. Was the train, at that time when you heard that noise, stationery or in motion.

A. I could not say for sure about it. Possibly we were moving a little, but I could not say for sure. Very slow, though.

36 Q. When you heard that cry, did you hear any other noise like knocking on the door?

A. Not at that time, but afterwards I heard them with the coal pick trying to knock the door down.

37 Q. After you heard the cry of fire, what did you do?

A. I set some brakes on these cars we had shoved in there, to keep them from rolling out, and run down there.

38 Q. How far were you from that Arms Palace car?

A. Possible eight cars, and I cut some of those cars off and run out possibly 100 yards—I would think about 100 yards. Cut the length of about eight cars from the horse car.

39 Q. What did you do after he cut the car off and run it out?

A. I set two or three brakes on the car and run down there.

40 Q. Where was the car when you got to it?

A. Right out to the switch on the main track.

41 Q. And had moved about how far from the other part of the train?

A. Possible from that cut of cars 100 yards.

42 Q. You were on the main, of course?

A. Yes, sir.

408 43 Q. What did you discover?

A. The fire-, engineer or conductor, one of them, had a coal pick trying to beat the door down.

44 Q. Did you see any colored man standing there?

A. Not until after I got there. Two colored men came out of the car immediately after I got there. They got out of the door this way.

45 Q. The door on which side of the car?

A. On the North side.

46 Q. The furtherest towards Lexington?

A. Yes, to the best of my remembrance, that is where they got out

47 Q. Did one or both of them get out of that car after you got there?

A. Both of them.

48 Q. Now what length of time had elapsed between the time when you first heard the cry of fire and the time when you got up there and saw those colored fellows coming out?

A. Possibly three or four minutes. Three anyway.

49 Q. Before you reached the car, had you heard any noise as if attempting to break in the door?

A. Yes, sir; I heard a loud knocking on the door.

50 Q. Did you hear anybody call?

A. I heard them holler to these colored men to get out.

51 Q. Did you recognize whose voice it was?

A. It was the conductor's, I think, yes, sir.

52 Q. Who was the conductor?

A. Mr. Fisher.

409 53 Q. When you got there what did you do, if anything?

A. Well, they got some buckets out of that car and I got up on the tank of the engine and dipped water, and handed it down to them.

54 Q. You dipped into the man-hole and handed the water to them?

A. Yes, sir.

55 Q. About how many buckets altogether were handed there?

A. Possibly 150 or 200.

56 Q. Had they handed any water out of that man-hole before you got there?

A. No, sir; I got up first.

57 Q. Where was Mr. Burns?

A. He was near the car there. He was not in the car, I don't think.

58 Q. He was not in his place on the engine?

A. No, no.

59 Q. Where was the engineer Mr. Mackey?

A. He was there too.

60 Q. Who else did you see there?

A. The conductor.

61 Q. What were they all engaged in when you got there?

A. They were trying to get them doors down.

62 Q. Did they succeed in breaking the doors then?

A. Never got them entirely down; no, sir. Not then.

63 Q. What steps were afterward taken, and by whom, if any, to get the horses out of the car?

A. Well, we were trying to get the horses down and after we got the colored men out they helped us to get the horses out.

410 64 Q. I thought you were up on the tank?

A. Yes, the other men were doing it. They told me as soon as I could to get water in there and told me to get up there and hand that water, and I did so.

65 Q. And you remained there until when?

A. Until they got the fire about extinguished.

66 Q. Did you go afterwards in that car?

A. Yes, sir.

67 Q. What horses did you find in there?

A. I cannot remember how many they had at that time but there were some horses in there still.

68 Q. After you got down there did you know how many had been taken out of the car—when you ceased to hand out the water and went down to the car?

A. I don't remember.

69 Q. Did you see those horses that were taken out?

A. Yes, sir.

70 Q. What was the condition of the light? Was it light or dark?

A. Well, it was night.

71 Q. Could you see any objects?

A. Well, the moon was shining slightly, but not very plain. You could see the horses.

72 Q. Did you make an examination of those horses?

A. No special examination, no sir.

73 Q. Could you tell whether or not they were burned or to what extent they were burned?

A. One appeared to be burned about the head. I never examined the others; I could not say.

74 Q. To what extent was he burned that you could say?

A. Well, the hair was burned off.

411 75 Q. Was his nostril burned?

A. I think so, yes, sir.

76 Q. You did see that one?

A. Yes, sir.

77 Q. Could you tell whether the others were or were not burned or singed?

A. No, sir; I made no examination.

78 Q. When did you go into that car? How long after the horses were gotten out was it before you went into the car?

A. I don't think they had all gotten out. I think they took one or two out after I went in there.

79 Q. Did you take any part?

A. Yes, sir.

80 Q. What did you do towards helping?

A. I don't remember the steps I took, but possibly I led one of the horses around and one on the outside took hold of the halter and we got them out in that way.

81 Q. Where were those colored men then?

A. There was one of them in the car at that time, I think.

82 Q. Helping with the horses?

A. Yes.

83 Q. Do you know whether one of them was on the outside?

A. I am under the impression he was.

84 Q. How many horses did they get out, do you recall?

A. They got out 5 and left 3 in the car.

85 Q. When you first got into that car what did you discover in the car on the floor?

A. Well, the fire had almost been extinguished. Considerable smoke in there and the hay was burned in the aisle.

412 86 Q. Where was the fire that was burning when you got in to it?

A. Right in the aisle. Seemed to have been a bale of hay——

87 Q. Which aisle.

A. Next to Louisville.

88 Q. What did you say about the hay?

A. The hay seemed to be piled up in the aisle to some extent.

89 Q. Did you observe any loose hay there?

A. It was all loose hay. Wasn't baled.

90 Q. Was there any baled hay there?

A. No, sir; I don't remember seeing any. Possibly there was baled hay there in the corner, but in that aisle the hay was loose.

91 Q. Could you state where the loose hay was in that aisle, with reference to the South side of the car?

A. It was right in the aisle. All over it——

92 Q. With reference to the South side?

A. The hay seemed to be loose on the South side. It was piled up in there.

93 Q. Did you see where the lanterns were, if they were in there?

A. Yes, sir.

94 Q. What did you see?

A. Apparently the bottom had melted out of the lamp and fell down.

Plaintiffs object; which objection is sustained by the Court.

A. Well, the bottom of the lamp was laying on that hay and the frame was still hanging.

95 Q. Did you see what had been attached to the lamp originally there?

A. By a wire.

413 96 Q. What was the condition of those wires, do you remember?

A. No.

97 Q. Were they in their place, or loose?

A. I think they were still attached to the walls of the car.

98 Q. Do you remember distinctly as to that?

A. Yes, sir.

99 Q. All of them?

A. Yes, sir.

100 Q. That is your opinion?

A. Yes.

101 Q. What about the other lantern?

A. I didn't see but one lantern.

102 Q. Did you go in the other aisle, the one next Lexington?

A. Yes, we carried water in there through that door.

103 Q. You had to get into that aisle to get back to the one at the South end?

A. Yes, sir.
104 Q. Did you see any lantern there?
A. No, sir.
105 Q. Did you notice up in the roof whether there was a lantern hanging from that?
A. No, I never.
106 Q. You never noticed?
A. No, sir.
107 Q. Can you now say whether you did or did not see a lantern in that aisle?
A. No, I cannot say I seen a lantern in that aisle, at all.
108 Q. What is your impression as to there being or not being a lantern there?
A. Well, I didn't see any. That is all I can say.
109 Q. What did you find inside of that car, after you got in there? Describe all you saw in there?
A. Well, those horses were considerably burned, some of
414 them that were in there, and the hay blew ashes and substance and considerable smoke from it. We had to pour water on it.
110 Q. Was there any means by which you could tell where the fire had been greatest?
A. Where it had been started you mean? Apparently in the bunch of hay.

Plaintiffs object.

111 Q. It was whereabouts?
A. Among that hay in the aisle.
112 Q. With reference to the South end, what condition did you find as to the fire there?
A. You mean the end towards Louisville? That was the end where the hay was in that was burned.
113 Q. What about the fire at the Lexington end?
A. There was no fire at that end.
114 Q. Had it been extinguished? Was there any evidence of there having been fire in that end?
A. No, there had not been any fire in there.
115 Q. Did you help to switch that train down there?
A. No, sir, I was on top giving the signals while the other men did the work.
116 Q. Were you in position to have heard any unusual knocking or jumping or clashing or bumping of those cars?
A. If there had been I would have heard it. Yes, sir.
117 Q. Did you hear any?
A. Nothing only the usual noise of switching cars.
118 Q. Was there any noise indicating there was an unusual bumping or jar?
A. No, sir, I never heard it.
119 Q. Would you have heard it?
A. Certainly I would.
415 120 Q. Could you say whether a man standing on the East end of that bridge (you know, that crosses there) could

have heard water being poured from the standing water tank into the tank of the engine?

A. No, sir, he could not.

121 Q. From the water tank?

A. A man on this end of the bridge?

122 Q. Yes.

A. No, sir, he could not have heard.

123 Q. How far could you hear a sound of water being emptied from the standing water tank through the water crane or pipe?

A. If the tank is empty where the water strikes the bottom of it, you can hear it possibly for three or four car lengths; but it is only for a short interval you can hear that far, after it begins to fill up you can only hear it for two car lengths.

124 Q. Did you see either of these men smoking a cigarette or cigar, or smoking at all, in the yard at Lexington?

A. Yes, I saw one of those boys with a cigarette lighted standing by the car door up here in Lexington.

125 Q. Where was he standing?

A. By the car door on the ground.

126 Q. Which door?

A. The door that was open where he was standing, where the conductor asked for his contract, immediately after the conductor left.

127 Q. Do you know whether he lighted it?

A. Yes, he lit it.

128 Q. Was he smoking or not when you left him?

A. Yes, sir, he was smoking.

129 Q. How long was that before the train started?

A. Only a short time. Not more than 30 minutes.

416 130 Q. Was it as much as thirty minutes.

A. Not hardly, I would not think, but I could not say the exact time.

131 Q. Did you see him get into the car or not?

A. No, I never seen him when he got into the car.

132 Q. Describe those two men whom you saw, to the jury.

A. One of them was a colored man, what you would call a black man; and the other one was in other words a yellow negro. He was a yellow fellow.

133 Q. Mulatto?

A. Yes, sir.

134 Q. Did you pick up the bottom of the lamp that you saw on the floor?

A. No, sir.

135 Q. Did you examine it?

A. No, sir.

136 Q. You just saw it lying there?

A. Yes, sir.

137 Q. You said it melted out?

A. Yes, sir, it looked like it had been melted, because the bottom would not have come out of this lantern——

Plaintiffs object; which objection is sustained by the court; the

court saying "Let that be stricken from your consideration, gentlemen of the jury."

Cross-examination.

1 Q. You say you saw those colored men in the Lexington yards?
A. Yes, sir.
2 Q. How long was that before the train started for Louisville?
417 A. It was not very long. Thirty minutes.
3 Q. What were they doing when you saw them?
A. They were standing by the car door.
4 Q. Both out or both in?
A. Both outside.
5 Q. What were you doing at that time?
A. The conductor and myself had been checking the train, and was passing along there.
7 Q. Just walking by?
A. Yes, sir.
8 Q. Did you stand there at all?
A. I stood there while the conductor was asking him for his contract?
9 Q. How long did you stand there, about?
A. Possibly 2 or 3 minutes.
10 Q. Just passed on?
A. Yes, sir.
11 Q. Didn't see them any more?
A. I didn't see them any more, before we left here. I have no recollection seeing them.
12 Q. During that two or three minutes, tell me exactly what occurred?
A. The conductor was there and asking for the contract and they refused to show it to him.
13 Q. What did they say?
A. I don't remember the words they said. But they asked him what he wanted with that—something like that.
14 Q. As nearly as you can, repeat to the jury what was said on both sides?
A. I don't remember the words that were passed.
418 15 Q. The conductor asked for their contract?
A. Yes, sir.
16 Q. And they wanted to know what he wanted with it?
A. Something like that. He told them he was the conductor, he had to have it.
17 Q. Did he give it to him?
A. They refused.
18 Q. Didn't give it to him while you were there?
A. Yes, sir.
19 Q. And you were not there more than two or three minutes?
A. Yes, sir.
20 Q. What were they doing during that time, talking to each other?

A. No, I don't think they were. They were talking to that conductor. He told them he wanted the contract.

21 Q. Did you see any of them smoking inside?

A. No.

22 Q. The boy you saw smoking was on the outside?

A. Yes, sir.

23 Q. That was in the neighborhood of thirty minutes before they started?

A. Something like that.

24 Q. Which door was it that this boy was in?

A. They were both out.

25 Q. You didn't see either one in there?

A. No, sir.

26 Q. When you got to Frankfort you stayed in West Frankfort to take water out of the water tank?

A. Yes, sir.

27 Q. Now, with reference to the sound of the water, that pipe that goes to the engine has considerable down-grade, hasn't it?

A. Yes, sir.

419 28 Q. Is it not a fact that water goes rushing down that pipe?

A. Yes, sir.

29 Q. And when you undertake to put water through it it goes down with sufficient speed to make it thump down it?

A. Yes, sir.

30 Q. Then you went away from that point on to the switching yard?

A. Yes, sir.

31 Q. About how far is that yard from this tank?

A. I could not say.

32 Q. You rode from Lexington in the caboose, did you?

A. No, I rode on the engine.

33 Q. When did you leave the engine?

A. When we got there in front of the depot in Frankfort.

34 Q. Where did you go then?

A. Looked over the train; looked along to see if there was any hot—and went on to the water tank.

35 Q. Did you look over the cars?

A. Looked at the wheels——

36 Q. Go all over the train?

A. Walked possibly, from the engine, possibly eight or ten cars.

38 Q. Did you examine the wheels on this horse car?

A. Yes, sir.

39 Q. You passed along back 8 or 10 cars?

A. Yes sir.

40 Q. What did you do then?

A. Turned back towards the engine. We were ready to go and got on the engine.

420 41 Q. You were standing on it when you took water?

A. No, I got off then.

42 Q. Then what did you do. Did you go back on the car before it quit switching or did you walk?

A. No, I walked back on the train when it was just in.

43 Q. You did go down to the switch yards?

A. Yes, sir.

44 Q. What amount of switching did you do there?

A. I could not say exactly, the switching. We made three or four switches.

45 Q. You told the jury in making that switch that the engine was switched with some of the cars?

A. Yes, sir.

46 Q. Now, tell the jury whether or not this horse car containing these horses was attached to the engine when you were doing this switching?

A. Yes, sir; the horse car was run next to the engine.

47 Q. And it was part of that section that did the switching?

A. Yes, sir.

48 Q. And besides the engine, how many cars were in that section that was doing the switching?

A. I don't know, don't remember.

49 Q. As many as 8 or 10?

A. I would think so.

50 Q. Including the horse car, or besides that?

A. Possibly besides, I won't say.

51 Q. So, in your opinion, at least 8 or 10 cars, including this horse car, were attached to the engine at the time the engine was doing the switching?

A. Part of the time. Part of the time less, and part of the time more.

52 Q. Well, was this horse car attached to the engine during all of that switching?

421 A. Yes, sir.

53 Q. No switching was done there, as you can recall it, after the horse car was attached to the engine?

A. The horse car was attached to the engine all the time.

54 Q. Do you know how many switches you made?

A. We made three or four.

55 Q. Where were you at the time of the cry of fire?

A. On top of the car.

56 Q. Was the engine attached to this car at the time?

A. Yes, we had backed some cars back into the passing track.

57 Q. You spoke of going to this car after you heard that cry of fire, and you saw the boys coming out—is it not a fact that they were bringing some horses out?

A. They did not bring any horses out, as they got out.

58 Q. Did either one of them have the horses as they came to the door to get out?

A. No, sir.

59 Q. After the boys got out, did you see them go back to get the horses out?

A. Yes, sir, after we told them to help us.

60 Q. You had to tell them to help you to get the horses out?
A. Yes, sir.
61 Q. What were they doing there?
A. That white looking fellow was standing there holding his nose, like he was burned.
62 Q. What was the other one doing?
A. Standing on the ground looking wise.
63 Q. What did you do when you first went into that car?
A. I dipped the water out of that tank for these fellows while they were putting the fire out, after they had the fire almost
422 extinguished.
64 Q. Had the horses, or not, or any of them, been taken out at the time you got out?
A. Yes, sir.
65 Q. And you told the jury at that time that the bottom of this lamp was in that aisle next to Louisville, and setting on the hay in that aisle?
A. Yes, sir.
66 Q. Now, is it not a fact that that fire had burned up that hay in the aisle, before you got in there?
A. Yes, it had burned over the top of it. I don't know whether it was burned clear to the bottom, or not.
67 Q. And you say the bottom of it was right under the handle overhead?
A. Yes, sir.
68 Q. And none of the wires that had been holding that lantern were broken?
A. Not that I remember. No, sir.
69 Q. Had any of the sides or walls of the stalls next to Louisville been afire?
A. This is the end the fire was in. Not in the stalls. I could not say about the stalls. Only the aisle.
70 Q. Was this fire confined to that aisle or did you see any evidence of burning in this stall near Louisville?
A. I could not say about that. I suppose it was burned in there if those horses were burned in there.
71 Q. You don't know whether it was burned in there or not?
A. No, I could not say.

423 KELLY, MAMIE, who having been first duly sworn, testified as follows on behalf of defendants:

1 Q. What is your name?
A. Mamie Kelly.
2 Q. Where do you live?
A. 6 Blackberry lot, Covington, Kentucky.
3 Q. How long have you been living there?
A. Five years this April coming.
4 Q. Where did you live before going to Covington?
A. 237 No. Upper st.
5 Q. Where were you born?

A. Lexington.
6 Q. Did you continue to live in Lexington until you went to Covington?
A. Yes, sir.
7 Q. How old are you?
A. 24.
8 Q. Where did your mother live before you went to Covington?
A. 237 No. Upper.
9 Q. Mamie, did you know a colored man by the name of Chester Frakes?
A. Yes, sir.
10 Q. Do you — one by the name of Horace Moore, called "Go Devil."
A. Yes, sir.
11 Q. Did you see these men on the 17th of Nov. 1910?
A. Yes, sir.
12 Q. Where did you see them?
A. Ida Wilson's.
13 Q. What time of day did you first see them?
A. About 11 o'clock.
424 14 Q. Who was there when they came in?
A. Ida Wilson, May Ella and Fannie Simmons and myself.
15 Q. Who is May Ella?
A. May Ella Simmons.
16 Q. Where is Fannie?
A. She is at her home.
17 Q. Did both of them go there together?
A. Yes, sir.
18 Q. What is the number of Ida Wilson's place?
A. It was 209 De Weese St.
19 Q. I will ask you to state whether or not you saw either or both of these men take anything to drink that morning?
A. Yes, sir.
20 Q. What did you see them drinking?
A. Chester bought half a pint of whiskey and Go Devil bought 15 cents' worth of beer in a bucket.
21 Q. Where did they buy it?
A. Got it in next door, at Luke Doyle's saloon.
22 Q. Was the whiskey bought there too?
A. Yes, sir.
23 Q. Where was it carried after it was bought?
A. Brought in Ida's.
24 Q. Who drank it?
A. All of us drank it. Chester and Go Devil and Ida and all of us drank it that was in the house.
25 Q. How much did you drink?
A. I guess about one third of a half pint. Every time they bought whiskey, they bought beer.
26 Q. Was any more brought in there before dinner?
A. They stayed in there plumb until it was time to go to the race

track to go to dinner. While they were there different ones were buying drinks.

425 27 Q. What other kind of liquor did they buy, while they were there that morning, after getting back from dinner and before dinner?

A. Beer and whiskey.

28 Q. Do you know how much was bought?

A. I could not tell who all bought drinks, because I bought a couple of drinks myself.

29 Q. Do you mean a couple of drinks for the whole party?

A. We would buy drinks, everyone in the house would drink it.

30 Q. When you bought the drinks, was that generally treated around?

A. Yes, sir.

31 Q. How many times was whiskey bought in the morning?

A. Go Devil bought one-half pint and Chester bought one; I got 15 cents' worth, and a dime's worth of beer, and Ida got 15 cents' worth of beer, and from that on different ones came in and bought.

32 Q. When did they leave?

A. Left there about twelve o'clock.

33 Q. What was their condition when they left?

A. They were drunk then.

34 Q. Was there any smoking going on there?

A. Yes, sir.

35 Q. What did they smoke?

A. Chester smoked a cigar and Go Devil cigarettes, and we women smoked cigarettes.

36 Q. How many times did you smoke?

A. Could not tell. As fast as they would go out we would make another one.

426 37 Q. Was it constant?

A. Yes, sir.

38 Q. What did Mr. Chester Frakes smoke?

A. Well, once he smoked a cigar; after that he would smoke cigarettes.

39 Q. Mr. Go Devil, what did he do?

A. Smoked cigarettes.

40 Q. Did he smoke any cigar?

A. I didn't see him.

41 Q. They went out at 12 o'clock to dinner?

A. Yes, sir.

42 Q. Did they come back there any more?

A. Yes, about one o'clock.

43 Q. Was there any more drinking down there after that?

A. Yes, sir.

44 Q. What did you see them drinking?

A. They drank from one o'clock to about five o'clock, time for them to go back to supper.

45 Q. What did you drink in the meanwhile?

A. Beer, whiskey and gin.

46 Q. Who bought the gin?
A. I got Chester to buy me some gin.
47 Q. Did they drink any of that gin?
A. Yes, sir.
48 Q. How many drinks did Chester drink?
A. We only got a half a pint of whiskey, and we all taken a drink out of the bottle.
49 Q. Was there any more gin bought after that?
A. No, sir.
50 Q. Any more whiskey?
A. Yes, sir.
427 51 Q. How much?
A. I say we drank constantly until about five o'clock in the afternoon.
52 Q. Did either or both of those men drink during that time?
A. Yes, sir.
53 Q. Were they smoking then during that time?
A. Yes, sir.
54 Q. What were they smoking?
A. Cigarettes.
55 Q. Where did they get the cigarettes from?
A. I had a package myself and May Ella had some and I goes after some too.
56 Q. Did you see them make up any cigarettes?
A. Yes, they made them out of ours.
57 Q. That was kept up until when?
A. Until about five o'clock in the afternoon.
58 Q. What was the condition of Chester and Go Devil?
A. We all was drunk.
59 Q. Where did you go at five o'clock?
A. At five o'clock they had to go to supper and then from supper to see if the car was ready.
60 Q. Did you see them after five o'clock?
A. Yes, they come back by Ida's. They was going to see if the car was ready.
61 Q. Who went with them?
A. I walked from Ida's to Constitution and De Weese and we got to Hays' saloon and we went in there and took a drink around, and Chester got a half pint of whiskey, and Go Devil and Fannie and myself stood outside on the corner and drank it out of the bottle on the street, and after we emptied the bottle they threw it on the ground.
428 Q. 62. Who did that?
A. Who did that?
63 Q. Yes, who spilled the bottle?
A. I threw it after we drank all the whiskey.
64 Q. Whose saloon was that?
A. Mr. Hays'.
65 Q. Where did you go from there?
A. I went to Spring and Main, Chester and them went to see about

the freight car to see if the car was ready, and they were to meet me at the corner of Spring and Main at McNamara's saloon.

66 Q. What time was this?

A. It was just dark. I guess about seven o'clock we met at Spring and Main.

67 Q. You did meet him there, did you?

A. Yes.

68 Q. Which one?

A. Go Devil and Chester.

69 Q. Did you go into McNamara's saloon?

A. Yes, sir.

70 Q. Did you take any drinks in there?

A. Yes, sir.

71 Q. Did he?

A. We all took a drink. Go Devil and Chester and myself.

72 Q. Well, did you buy any more whiskey there?

A. Yes, sir.

73 Q. What did you buy?

A. I took whiskey, Chester whiskey and Go Devil whiskey.

74 Q. Now, in addition to the whiskey you drank there, was any bought by anybody and carried away?

A. They had a quart of whiskey and we got a half pint at Spruce and Constitution. They had a quart with them. Took it to the car then.

429 75 Q. Did they take that to the car?

A. I know when I got to the car about a quarter past eight o'clock they had whiskey there and I drank some more of it then.

76 Q. Who did you go to the car with?

A. Chester and Go Devil.

77 Q. Did you go into the car then?

A. I tried to go in; but I was too drunk, I couldn't.

78 Q. Did they go?

A. Yes, sir.

79 Q. Where did you get this liquor you drank there?

A. Chester went in the car and got it.

80 Q. What did he bring it out in?

A. Brought it out in a bottle.

81 Q. What sort of a bottle was it?

A. A pint bottle.

82 Q. After you all got through taking a drink, what did you do with the balance, or was there any balance?

A. Took it back and put it in the car.

83 Q. What was their condition when you left them?

A. We all was drunk.

84 Q. Were they drunk?

A. Yes, sir.

85 Q. Did you see them smoking down there at all?

A. Yes, sir.

86 Q. Who?

A. We all took a cigarette apiece.

87 Q. Did you know whether they had any cigarettes with them on their persons?

A. Yes, sir.

430 88 Q. Or tobacco?

A. Yes, sir.

89 Q. Did they have any pipes that you know of or not——

A. I didn't see any pipes.

90 Q. What did they have to make the cigarettes of?

A. Package of Bull Durham tobacco and paper.

91 Q. Did they have any cigars that you know of?

A. Yes, sir.

92 Q. Who?

A. Chester.

93 Q. Where did he have them?

A. Just in a package.

94 Q. Of the two, could you say which was the drunker?

A. Both looked pretty full to me.

95 Q. Where did you leave them?

A. They said it would not be very long before the car would pull out. I was sitting on the track where the switch is. They said it would not be long before the engine — come back to pull out. I left Ida at McNamara's saloon, and went on back up there and Chester got in and I came on away.

96 Q. That was that time?

A. About a quarter to nine.

97 Q. Did you find Ida May?

A. Yes, sir.

98 Q. Where did you all go then?

A. Ida and I stayed there until about twelve o'clock.

99 Q. At McNamara's?

A. Yes sir.

431 Cross-examination:

1 Q. Where did you say you lived, Mamie?

A. No. 6 McVey Alley.

2 Q. What alley?

A. McVey.

3 Q. How long have you lived there?

A. It will be five years the 11th of this April coming.

4 Q. How did you happen to be in Lexington on Nov 17, 1910?

A. I had been to Danville, Ky., to bury my fellow.

5 Q. To bury your fellow?—How long did you stop off here on the way home from the funeral?

A. About five weeks.

6 Q. And then you went back to Covington?

A. Yes, sir.

7 Q. And you have been there since?

A. Yes, sir.

8 Q. What time of day would you say you first saw Chester and Horace Moore on the 17th day of November.

A. About 11 o'clock.

9 Q. And where did you see him?
A. 209 De Weese St.
10 Q. Whose house is that?
A. Ida Wilson's.
11 Q. Were you stopping at Ida's at that time?
A. No, sir.
12 Q. Where were you stopping?
A. My mother's.
13 Q. How far is that from Ida's?
A. About half a square on the other side of the street.
432 14 Q. Had you ever lived at Ida's?
A. No, sir.
15 Q. How long had you been at Ida's when Chester and Go Devil came there?
A. About nine o'clock that morning.
16 Q. Did you know they were coming?
A. No, sir.
17 Q. And the first drinks you took were what?
A. Half a pint of whiskey and 15 cents' worth of beer.
18 Q. How many of you drank it?
A. Ida Wilson, May Ella, Fannie Macey, Go Devil, Chester and myself.
19 Q. And you continued to drink there for how long?
A. Until about 12 o'clock.
20 Q. And then what went with Chester and Go Devil?
A. They went to dinner.
21 Q. Do you know where they went to dinner?
A. They said they were getting it on Race Street in front of Thomas Street.
22 Q. What time did they get back there?
A. About one o'clock.
23 Q. You say they were drunk when they left there?
A. They acted like it.
24 Q. And you say they got back at one o'clock?
A. Yes, sir.
25 Q. And continued drinking?
A. Yes, sir.
26 Q. What time did they stay there and continue to drink?
A. Until five o'clock.
433 27 Q. Did they leave there at all during the time when they got there until five o'clock?
A. Not that I knows of.
28 Q. Still drinking?
A. Yes, sir.
29 Q. Were they drunk?
A. Well, pretty full.
30 Q. Then they left to go where?
A. To go to supper.
31 Q. At five o'clock?
A. Yes, sir.
32 Q. Didn't you say they left there to see if the car was ready?

A. I said they left to see if the car was ready, but they went to supper first.

33 Q. How do you know?

A. Because they said so.

34 Q. How long did they stay?

A. Half an hour.

35 Q. Did they come back where you were?

A. Yes, sir.

36 Q. Then it was 5:30 before they came back at all?

A. I didn't look at the watch.

37 Q. You said they went to supper at five o'clock and stayed about half an hour?

—. ——.

38 Q. How long did they stay when they got there?

A. About half an hour.

39 Q. Then where did they go?

A. Supposed to go to see if the car was ready.

40 Q. Where did they go?

A. I didn't go with them.

434 41 Q. And then it was what o'clock?

A. I don't know what time.

42 Q. But they stayed 30 minutes after getting back from there?

A. I said seemed to me about that time, I didn't watch the clock.

43 Q. How long were they away from you when they left at that time?

A. What time are you speaking of—it seemed to me they stayed there about 30 minutes.

44 Q. You mean that long when they came from supper?

A. No, they had been to supper and stayed about thirty minutes.

45 Q. As they left, did you leave the house with them?

A. What time are you speaking of?

46 Q. After they stayed there what seemed to you about 30 minutes?

A. You mean how long when they came from supper?

47 Q. No, they had been to supper and stayed about thirty minutes.

A. As they left, I left the house with them.

48 Q. At what time?

A. I don't know.

49 Q. About what time——

A. I don't know. It was after dark.

50 Q. Where did you go with them then?

A. They was on their way to go to the car, and we stopped at Constitution and Spruce streets to get a drink.

51 Q. Took a drink inside?

A. Yes, sir.

52 Q. Did you get any other in there to drink?

A. Yes, half a pint of whiskey, and stood outside and

435 drank it.

53 Q. And then what became of them?

A. They went on then to see about their horses.

54 Q. Do you know where they went?
A. I know where they said they went. To see about the car.
55 Q. Did they say where they were going?
A. Down in the freight yards, I guess.
56 Q. And that was when you left and went to Constitution Street—how many of you drank that half pint of whiskey?
A. Fannie, Go Devil, Chester and myself.
57 Q. When did you next see Chester and Go Devil?
A. Spring and Main.
58 Q. Where was that?
A. McNamara's saloon.
59 Q. When was that?
A. Seemed to me like three quarters of an hour after that, after we just left them.
60 Q. Did you go down there with them?
A. No, sir, I met them there.
61 Q. At whose saloon?
A. Tom McNamara's.
62 Q. How many drinks did you take in there?
A. Oh, we drank along until time for him to go to the car.
63 Q. And both boys were there?
A. Yes, sir.
64 Q. And you went from there with them to the car?
A. Yes, sir.
65 Q. How long did you stay out of the car or about the car?
A. Oh, I don't know.
66 Q. Well, as near as you can get at it.
A. I guess I stayed down there at the car about 20 minutes. Something like that.
436 67 Q. Then you left?
A. Yes, sir.
68 Q. And Chester went inside and got what sort of a bottle of whiskey?
A. Got a pint.
69 Q. Do you know what had become of that quart?
A. They had two pints. That made a quart.
70 Q. Oh, it was in two pints?
A. Yes, sir.
71 Q. Didn't you tell the jury they had a quart bottle of whiskey?
A. I said a quart of whiskey. I didn't say a quart bottle. Chester had a pint when they left Constitution, and Go Devil had a pint that they took to the car.
72 Q. And you don't know whether they went down in the yards to the car or whether to the shute?
A. I know they went down straight towards the car and if they went to the race track they would not have went Race Street.
73 Q. They were going away from the track then?
A. No, leaving Constitution Street where they drank whiskey at.
74 Q. But they were going away from the direction of the track when they came down there?
A. Yes, sir.

75 Q. And you remained there for about twenty minutes at the car but could not go in?
A. Yes, sir, I sat down on the railroad track.
76 Q. Did you see any railroad men, the engineer or brakemen, down there?
A. I didn't see nothing but two or three men down there.
437 77 Q. Who were they?
A. I don't know.
78 Q. Where were they?
A. All around the car.

SIMMONS, MAY ELLA, who having been first duly sworn testified on behalf of the defendant as follows:

1 Q. Where do you live?
A. 230 Wickliffe St.
2 Q. How old are you?
A. 21 years old.
3 Q. Do you know a fellow they call Go Devil?
—. ——.
4 Q. I believe his name is Horace Moore, isn't it?
A. Yes, sir.
5 Q. What name does he generally go by?
A. Go Devil.
6 Q. Do you know Chester Frakes?
A. Yes, sir.
7 Q. How long have you known him?
A. Two years I suppose.
8 Q. Did you ever hear anything about some horses being burned in a car?
A. Yes, sir.
9 Q. Did you see either or both of these men about that time?
A. After the fire was, I did.
10 Q. You didn't see them before the fire?
A. Yes, I seen them before or after?
11 Q. Where did you see them?
A. Down about Spring and Main.
12 Q. Did you see them anywhere else?
A. At Ida Wilson's.
13 Q. What time of day was it when you saw them?
A. About two o'clock, after dinner.
14 Q. Did you see them do any drinking that day?
—. ——.
438 15 Q. What?
A. Beer and whiskey.
16 Q. Who drank?
A. Both of them.
17 Q. Who else?
A. Myself and Ida and Mamie Kelly.
18 Q. Where did you drink that whiskey?
A. Ida Wilson's.
19 Q. Where did they get that whiskey.

A. Down at Alexander's saloon.
20 Q. Do you know how much they bought?
A. No, sir.
21 Q. How many rounds of whiskey did you all have there?
A. About two.
22 Q. Who bought the liquor?
A. Both of them was buying it.
23 Q. Did you go down with them to buy it?
A. No, sir.
24 Q. Where did you see it?
A. Ida Wilson's.
25 Q. Who brought it there?
A. Ida was going after drinks.
26 Q. Did she go after the drinks?
A. Yes, sir.
27 Q. How many drinks did they have altogether that evening?
A. I don't know, sir.
28 Q. You don't know.
A. I don't know how many altogether.
439 29 Q. How many did you have?
A. I could not tell.
30 Q. How many did you see any one of them take?
A. They would drink every time they went out and bought it.
31 Q. How many times did they send out and buy it?
A. I remember two—twice.
32 Q. How much did they buy?
A. Half pint of whiskey and about 15 cents' worth of beer.
33 Q. Who would drank that?
A. Ida Wilson, Mamie Kelly, Go Devil and Chester.
34 Q. Did you see any smoking up there?
A. Yes, sir.
35 Q. What?
A. Cigarettes.
36 Q. Who? Go Devil?
A. All of them was smoking.
37 Q. You too?
A. Yes, sir.
38 Q. Where did the cigarettes come from?
A. They took it out of their pockets.
39 Q. Chester and Go Devil both?
A. Yes, sir.
40 Q. When was the last time you saw these people that day?
A. It was about eight o'clock. I left them down at Spring and Main.
41 Q. When did they leave you up there at Ida Wilson's house?
A. They left and said they were going out to the track to dinner.
42 Q. Then after dinner did they come back?
A. Yes, sir.
43 Q. Had they had any drinks before dinner?
A. Yes, sir.
440 44 Q. How many?
A. Two.

45 Q. Two drinks apiece?
A. They bought two rounds of whiskey but they had more than two drinks.
46 Q. What do you mean by two rounds of whiskey?
A. Went out and bought it twice.
47 Q. What time did they go to dinner?
A. 12 o'clock.
48 Q. How long were they gone?
A. About an hour and a half.
49 Q. Where did they go to?
A. Stopped at Ida's.
50 Q. Any more drinking done then?
A. Yes, sir.
51 Q. How much?
A. About 15 cents' worth of beer and a half pint of whiskey.
52 Q. But any more after that 15 cents of beer and half pint of whiskey.
A. They went on down the street and bought some whiskey.
53 Q. Where did they buy it?
A. Corner of Spruce and Constitution.
54 Q. Did you drink any of that?
A. No, sir, I didn't.
55 Q. You had enough, had you—did you go down to Constitution and Spruce?
A. Yes, sir.
56 Q. Were you there when they bought some whiskey?
A. Yes, sir.
441 57 Q. Did you drink in there?
A. No, sir.
58 Q. Where was the next time that day you took a drink?
A. I never took any drink with them any more until that night.
59 Q. Where did you go then?
A. They went on down to Chicago bottom.
60 Q. Do you know where they went from Chicago bottom?
A. No, sir.
61 Q. Where was the next time you saw them?
A. That night at Spring and Main.
62 Q. What time?
A. Between 8 and 9 o'clock.
63 Q. Do you know where they had been in the meantime?
A. They left from Chicago Bottom and came on down to town.
64 Q. Did you go with them to Chicago bottom?
A. No, sir.
65 Q. You don't know what they did there then?
A. No, sir.
66 Q. Where did you meet them next?
A. Between 8 and 9 o'clock at Spring and Main.
67 Q. Anybody's house?
A. McNamara's.
68 Q. What did you do there?
A. Drink.

69 Q. Who treated?
A. Go Devil.
70 Q. Anybody else?
A. Chester; both of them treated.
71 Q. Did you see them buy any whiskey there except what they drank?
A. No, sir, no more than what they bought to drink.
442 72 Q. They did take a drink at the bar, didn't they?
A. Yes, sir.
73 Q. Did they buy any whiskey to put in a bottle at that place?
A. I didn't see it.
74 Q. How long did you stay there with them?
A. Until they got ready to go to the car, about ten o'clock.
75 Q. What was your condition then?
A. I didn't go down there.
76 Q. You don't know when they went to the car?
A. Not exactly, I don't.
77 Q. What was their condition when you last saw them at McNamara's?
A. Drinking.
78 Q. Were they drunk?
A. Yes, sir, both of them.
79 Q. Both of them?
A. Chester was drunker than Go Devil was.
80 Q. Who went to the car with them?
A. Mamie Kelly.
81 Q. Any other women?
A. Not that I know of.
82 Q. Where was Ida Wilson?
A. She was in one room at McNamara's.
83 Q. Did she take any drinks down there?
A. I don't know how many she taken.
84 Q. Did Go Devil take any notes you wrote?
A. Yes, sir.
85 Q. Whereabouts?
A. McNamara's.
86 Q. Who did you write to?
A. A boy they called Todalo.
443 87 Q. What is Todalo's proper name?
A. Will is his first name—I cannot think of his last name.
88 Q. Where is Will?
A. He is out in Florida. He was in Jacksonville, Florida, when I give him the note.
89 Q. You wrote a note to Todalo?
A. Yes, sir.
90 Q. Who did you give it to?
A. Go Devil.

Cross-examination:

1 Q. Was Go Devil going to Jacksonville, Florida?
A. Yes, sir.

2 Q. And you were sending this note to Jacksonville, Florida, to Todalo?
A. Yes, sir.
3 Q. What time was it when you gave him that note?
A. About half past nine.
4 Q. Don't you know the train left there before half past nine?
A. No, sir; I don't know whether it left before or not.
5 Q. Were they going to walk away or ride away?
A. Said they were going to ride.
6 Q. And go to Jacksonville, Florida?
A. Yes, that is when I gave him the note. I was telling the jury there I told him to give it to Todalo.
7 Q. What time on Nov. 17, 1910, was it that you first saw Go Devil or Chester?
A. Out in the East end—Dedburn St.
8 Q. What time of day was it?
A. About dinner time.
444 9 Q. Didn't you state all through the first answers you gave to this jury that you saw them that day at 2 o'clock after dinner?
A. I seen them after dinner and before dinner too.
10 Q. But didn't you say the first time you saw them that day was 2 o'clock?
A. No, sir.
11 Q. Now, what time did you say the first was you saw them?
A. Dinner time. They were going to dinner.
12 Q. What time of day?
A. About 12 o'clock.
13 Q. About 12 o'clock?
A. 12 or half past.
14 Q. Who was with them at the time you saw them?
A. Ida Wilson.
15 Q. Anybody else?
A. Mamie Kelly.
16 Q. Made the third?
A. Yes, sir.
17 Q. Did they stay there?
A. Yes, sir.
18 Q. How many drinks did they take?
A. They only got two rounds of whiskey.
19 Q. What time did they leave there?
A. After they bought the whiskey?
20 Q. Yes, the two rounds.
A. About half past 2 or 3.
21 Q. They stayed there then until half past two or three?
A. Yes, sir.
22 Q. Before they went to dinner?
A. After they had been to dinner and come back.
445 23 Q. What I want to know is how long they stayed there after taking those two rounds of drinks before they left, after you first saw them?

A. I don't exactly know how long they stayed after they taken the two drinks. I know when they got back how long they stayed.

24 Q. What time of day was it they left there after taking those two rounds of drink-.

A. First round—about half past two or three.

25 Q. Then you took the first two rounds of drink- and they stayed right there at whose house?

A. Ida Wilson's.

26 Q. Until half-past two or three o'clock.

A. No, sir, they didn't stay there until then. It was about half past two or three when they was there at the house.

27 Q. Then you didn't see them first at 12 o'clock?

A. Yes, I *seed* them at 12 and half past two or three after they come from dinner.

28 Q. How many drinks did they take before dinner?

A. Two.

29 Q. How long did they stay there after they took those drinks, before they went to dinner?

A. About half an hour.

30 Q. How long were they gone to dinner?

A. About half past two or three.

31 Q. Then you didn't see them before two o'clock at Ida Wilson's?

A. It was between half past two and three.

32 Q. When they got back there at half past two or three how long did they stay?

A. They hadn't gone.

446 33 Q. Well, if they hadn't gone, how long did they stay?

A. Half past two or three.

34 Q. Half past two or three—have you been talking to Green Lewis about this case?

A. No, sir.

35 Q. Don't you know him?

A. No, sir.

36 Q. Hasn't he been talking to you? Running out there talking up this case and consulting witnesses? Talking to you and Mamie Kelly?

A. No, sir.

37 Q. Never have spoken to him about this?

A. Yes, I have spoken to him.

38 Q. When did you talk to him?

A. I was talking to him yesterday.

39 Q. When was the first time you ever talked to him about it?

A. The first time was when I first got the paper.

40 Q. You never had a talk with him until he brought you the paper?

A. No, sir.

41 Q. What paper did he bring you?

A. He didn't bring it to me.

42 Q. Who brought it?

A. I don't know who the white fellow was who brought it.

43 Q. What kind of paper was it?
A. A certificate.
44 Q. Certificate of what character?
A. I don't know sir.
45 Q. You never had told anybody what you knew about this thing until that white fellow brought you a paper, had you?
A. No, sir.
447 46 Q. Never have had a talk with Kriner?
A. No, sir.
47 Q. How long after you got that paper before Kriner came to you?
A. I don't know, sir.
48 Q. What did he say, when he came?
A. He never came to me.
49 Q. Did you go to him?
A. No, sir.
50 Q. How did you manage to talk to him then it he did not come to you and you didn't go to him?
A. I just seen him.
51 Q. Where did you see him?
A. On the street.
52 Q. Whereabouts?
A. Wickliffe street.
53 Q. What did he say to you?
A. Didn't say anything to him but I spoke to him.
54 Q. Is that all?
A. Yes, sir.
55 Q. Then when did you first talk to Kriner about this case?
A. I never talked to him about it?
56 Q. Never have?
A. No, sir.
57 Q. Didn't he go and get you and take you to some lawyer's office to tell what you knew?
A. He came and took me down to the office; yes, sir.
58 Q. When did he do that?
A. Monday.
59 Q. That was the first time he had ever taken you anywhere to tell what you knew?
A. Yes, sir.
448 60 Q. Has ever a man been around where you were with a little typewriter, taking down your statements?
A. No, sir.

Adjourned to meet at two o'clock.

Met pursuant to adjournment.

WILSON, IDA, who being first duly sworn, testified on behalf of defendant as follows:

1 Q. What is your name?
A. Ida Wilson.
2 Q. Where do you live?

A. On Wickliffe Street, 236.
3 Q. How old are you?
A. I will be 39 on my birthday.
4 Q. Have you lived in Lexington all your life?
A. No, sir; I have not lived here all my life.
5 Q. How long have you been living on Wickliffe Street?
A. Since the 4th of July.
6 Q. Where did you live before that?
A. Lived on De Weese St., 209.
7 Q. Where were you living on Nov. 17th last year?
A. De Weese Street.
8 Q. Do you remember when some horses were burned on a car?
A. Yes, sir.
9 Q. Did you see on that day, the day of that burning, did you see Chester Frakes and Go Devil?
A. I saw Chester, but I don't remember seeing Go Devil.
449 10 Q. Where did you see Chester?
A. At my house, on De Weese Street.
11 Q. What time did you see Chester?
A. I could not tell exactly what time I saw him come there. Only he said that they just got in; but when it was, I don't know.
12 Q. Where from?
A. They didn't say. Just spoke to the girls. They didn't tell me. I never asked them.
13 Q. I want you to tell the jury whether or not you saw him drinking?
A. Oh, yes, they bought a drink in there before they went to the track.
14 Q. Who?
A. Chester, or whoever was with him. I don't know who bought it. I don't remember seeing Go Devil. There was a lot of race track boys in there, I know they had something to drink.
15 Q. Some others there besides Chester?
A. Yes, sir.
16 Q. You don't know who they were?
A. I don't remember. That is the reason I don't say I seed Go Devil, because I don't remember.
17 Q. Where did you see Chester drinking?
A. When they went after the beer and whiskey they brought it back and passed it around.
18 Q. How many did you see them drink there?
A. They bought the drinks when they first came and when they came back they bought one.
19 Q. What kind of drinks?
A. Beer.
20 Q. Beer?
A. No, sir, just a little old half pint bottle of whiskey. The women went out after it. They put their money up and they went and got it.
450 21 Q. Did you see him drink any?
A. No, sir; I knowed they were drinking in the cars. I didn't see him drink.

22 Q. Didn't you see him in the morning?
A. No, sir, they said he had just come in.
23 Q. Did you see him twice in that afternoon?
A. Yes, sir; they came when they got there and then in the afternoon.
24 Q. How many times did he drink?
A. I seed drinks were bought, but whether he drank I don't know.
25 Q. Was he drinking or under the influence of liquor that day?
A. No, sir, he was drinking and looked like to me to be drunk, but whether he drank in there I don't know. No, sir, he was not drunk.
26 Q. What time did he leave your house?
A. I could not answer. He left that afternoon.
27 Q. Was it after or before dark?
A. It was in the day.
28 Q. Left there before dark?
A. Yes, sir.
29 Q. Did he come back any more?
A. I never seed him any more.
30 Q. Did you see him any more that day?
A. No, sir, I saw him that night.
31 Q. About what time that night?
A. Getting dark, before the car pulled out. At Red Mac's old place.
32 Q. What were they doing there?
A. They were all standing at the counter when I got in.
451 33 Q. Who?
A. Mamie Kelly, May Ella and the whole lot of them there standing in the saloon.
34 Q. Who was May Ella?
A. May Ella Simmons.
35 Q. Did you see him take any drinks?
A. They were drinking at the counter when I got in there.
36 Q. Did you see Chester take a drink there?
A. No, sir. I saw them all standing at the counter.
37 Q. And all drinking?
A. Yes, I saw them all at the counter.
38 Q. Where did he go from there?
A. No, he said he was going on to the car. They went out the door and I was to wait for Mamie Kelly. I know he said he was going to the car.
39. Q. Can you tell about what time that was?
A. Looked like about eight or nine o'clock, as well as I remember.
40 Q. What was his condition?
A. I never paid any attention to him, because Mamie told me to come go with her and I told her I would not go but I would wait until she came back.
41 Q. Where did she start to go?
A. Down to the car with them.
42 Q. You didn't go?
A. No, sir.

43 Q. You don't know whether she got there or not?
A. No, sir; she went out of there.
44 Q. Did you see Chester smoke at any time down there or that day?
A. No, sir.
452 45 Q. You don't recall that?
A. No, sir, I don't remember if he was.

Cross-examination:

1 Q. You say Chester wasn't drunk?
A. No, sir, he was not drunk; what you call a drunken man, and staggering. He had his own senses when he was at my house.
2 Q. When was he at your house?
A. He was there twice during the day, but I could not tell you what time it was when they left. When he came he said he just got in.
3 Q. Do you know whether he got there in the afternoon or before noon?
A. Oh, yes, sir, he come about dinner the last time.
4 Q. The first time, was that before dinner?
A. I don't know, sir; that is the reason I am telling you I don't know.
5 Q. But you knew the last time was after dinner.
A. Yes, sir.
6 Q. You didn't see Chester drunk that day or night, at all, did you?

Defendant objects; which objection is overruled by the Court; to which ruling of the court defendant excepts.

A. I didn't see him drunk. I saw him drinking.

453 SLAVIN, DAN, who being first duly sworn testified on behalf of the defendant as follows:

1 Q. Where do you live?
A. 312 Jefferson street.
2 Q. How long have you been living in Lexington?
A. For 30 years.
3 Q. What is your employment?
A. Foreman in the L. & N. yards.
4 Q. Were you foreman of the Company on the 17th day of November, 1910, or what was your occupation?
A. Foreman.
5 Q. Same place you occupy now?
A. Yes, sir.
6 Q. How long have you been working for the L. & N.?
A. About five years.
7 Q. How long have you been foreman in the switch yards?
A. A little over a year.
8 Q. Do you remember the occasion when a train composed in part of an Arms Palace car went out of Lexington and a fire caught down in Frankfort and burned some horses?

A. Yes, sir, I have a recollection of that.
9 Q. Do you recall when that train left or pulled out of the yard?
A. Left at nine o'clock.
10 Q. Was it late or on schedule time?
A. A little late.
11 Q. Do you recall what the schedule time was then?
A. 8:40 the time it was due to leave.
454 12 Q. Did you see two attendants who were accompanying that car or the horses in it?
A. I didn't see them in the car but I seen them two fellows come through the yards and ask where the cart was at, and I directed them where it was at.
13 Q. Was that before or after the car had come in off the C. & O. Switch?
—. ——.
14 Q. How long afterwards?
A. I suppose 20 minutes afterwards.
15 Q. From which direction did they come?
A. East end of the yards.
16 Q. And moved in what direction?
A. Going South.
17 Q. Did they describe the car they wanted?
A. No, sir, they asked me where the horse car was at that was going out on the following train. I told them the only one I knowed was down at the lower end of the yard.
18 Q. What did they do then?
A. Went on down that way, one of them got by me a little piece and kind of cursed and hollered.
19 Q. What did he say?
A. I don't recall what he said.
20 Q. How did he holler?
A. Just gave a loud holler and made a swear.
21 Q. Which one was that, do you know?
A. I don't know.
22 Q. Describe those two men to the jury?
A. One a light one, I suppose 5 feet 6 inches high, and the other one dark, a little taller.
455 23 Q. What did the other fellow do? Did you see him do anything?
A. I didn't see him do anything.
24 Q. What was the condition of those men as to being sober or drunk?
A. Looked to me like they were drunk.
25 Q. One or both of them?
A. I didn't pay much attention to them. Just the way they acted.
26 Q. I say one or both of them.
A. Both of them.
27 Q. Were they smoking, either of these men?
A. No, sir, neither was smoking.

Cross-examination:

1 Q. About how long before the car started did you first see these men?

A. Well, just about 20 minutes before they left the yard.

2 Q. Did you meet them or were you walking in the same direction?

A. No, sir, I was going East and they were going South.

3 Q. What was the question he asked?

A. Asked me where that horse car was at that he was going out on that train.

4 Q. Where was the horse car going out on that train?

A. Yes, sir.

5 Q. And that was about 20 minutes before train time?

A. Yes, sir.

6 Q. Did he ask you anything else?

A. No, sir.

7 Q. Did he say anything there that was insulting, un-telligible to you?

A. No, sir; when he got down below here a little piece he gave a holler.

456 8 Q. Was there anything in that that made you think he was drinking?

A. I thought there was.

9 Q. Did he say anything to you except that one question?

A. No, sir.

10 Q. Was there anything in that question that made you think he was drinking?

A. I thought there was.

11 Q. Did he say anything to you except that one question?

A. No, sir.

12 Q. Was there anything in that question that made you think he was drinking?

A. After he got up.

13 Q. In that question was there anything that made you think he was drinking? ?

A. Not in that question.

14 Q. Did he do anything else that made you think he was drinking?

A. Not then.

15 Q. Your statement is that what made you think he was drinking was not from what he done then, but what he said?

A. From the way he did after he got by me.

16 Q. What did he do?

A. Gave a holler—an oath.

17 Q. The other one didn't say anything?

A. No, sir.

18 Q. Did he whisper?

A. No, sir.

19 Q. He neither did or said anything that made you think h. was drinking too, did he?

A. Yes, sir.

457 Redirect examination:

1 Q. Which one of them, if you recall, have you described as being the one (or did you describe the one) who gave the holler?
A. No, sir.
2 Q. You didn't him?
A. No, sir.
3 Q. You don't know which one he was?
A. No, sir.

ISGRIGG, HENRY, who being first duly sworn testified on behalf of the defendant as follows:

1 Q. Where do you live?
A. I live at 161 Jefferson St., Lexington.
2 Q. What is your occupation?
A. Night watchman in the L. & N. freighy yards.
3 Q. How long have you been night watchman there?
A. A little over five years.
4 Q. Do you remember when a certain palace horse car which left Lexington here was burned?
A. Yes, sir, I heard of it.
5 Q. Do you remember anything about that car being attached to a train?
A. I do not.
6 Q. Did you have any questions made by anybody about the time that car was to go out, about that car?
A. Yes, sir.
7 Q. Who made the inquiries and what were the inquiries?
458 A. Well, I was standing at the end of the freight house the West end, my business is to watch those cars until they pull the cars out, and while I was there there was a young man came down from there, from towards Main Street, down Merino, and he made the remark to me "where is my car" or "have they moved my car," I don't know which; something to that effect. I said "up there in the shute or down in the yard; go and see."
8 Q. Did he describe where this car was?
A. I don't know about where the car was, or nothing about it, but I suppose the horse car was what he was hunting.
9 Q. What was his manner?
A. He seemed to be in a hurry, and he was walking all over the road.
10 Q. What do you mean by walking all over the road?
A. Staggering.
11 Q. Was anybody with him?
A. No, sir.
12 Q. Can you describe that man; was he white or black?
A. Well, I think he was white. He was very light, or else he was a very light colored darky.
13 Q. Describe his form and size?
A. He was small.
14 Q. Anything else pass between you?

A. Nothing else passed between us.

15 Q. How far did you see him walk?

A. I suppose about 50 yards.

16 Q. Did you watch him?

A. Yes, sir, I was going towards him and after he turned off on the platform where they hold horses I stood and watched him about half way down the shute, I reckon, and then I could not see him any more.

459 17 Q. Well, did he go in the direction of the car?

A. Yes, sir.

18 Q. You told him where the direction was, did you?

A. Yes, sir.

19 Q. How long was that before that car went out?

A. Well, that train went out about nine o'clock I guess. The time it generally leaves was about seven.

20 Q. And that was about how long before it?

A. About two hours.

21 Q. Did you see any more of that fellow that evening?

A. Just before the train pulled out I was down in the yards and passed by the car and he was lying on some hay, or straw maybe, in one of those cars. The door was open and I just looked and saw them laying there. I didn't say a word to either one of them.

22 Q. How many were there?

A. Two.

23 Q. Describe the other one?

A. I don't know that I could describe the other one. I did not pay any attention to them.

24 Q. Whereabouts in the car were they?

A. Right in the center of it.

25 Q. How did you see them?

A. The door was open.

26 Q. Which door?

A. The side door where they led the horses.

27 Q. Wasn't there two doors on each side of this car?

A. On the North side. The car was headed that way.

460 28 Q. Towards which end, the South end or the end towards Lexington?

A. I don't know that I noticed which end it was. I could not say.

29 Q. Did you see any light in there?

A. Yes, sir; there was a light in there.

30 Q. How was it lighted?

A. A lantern hung up to the ceiling.

31 Q. How long was that before the car went out?

A. I suppose about 10 or 15 minutes.

32 Q. Do you know whether the conductor had then checked up his train?

A. No, sir.

33 Q. You don't know.

A. No, sir.

34 Q. Was that the last you ever have seen of those respective gentlemen?

A. The last time all that passed between us.

SALLEE, ED. LEE: Who having been first duly sworn, testified on behalf of defendants as follows:

1 Q. What is your name?
A. Ed. Lee Sallee.
2 Q. Where do you live?
A. In the East end of town on Nelson Avenue, 304.
3 Q. How long have you been living in Lexington?
A. About eight years.
4 Q. What is your occupation?
A. Car Inspector.

461 5 Q. Do you recall inspecting a car, an Arms Palace horse car, on the 17th day of November, 1910?

A. Yes, I remember of the car, although I did not keep any record of the car; the switchman kept the record of the car, these that was delivered to us, one car.

6 Q. Do you remember where that car came from?

A. I remember the C. & O. having a night crew, brought it to the L. & N.

7 Q. Where was it delivered in the L. & N. yards?

A. If I am not mistaken, it was put on the old main line. We have got what we call an old and a new main down there.

8 Q. Did you inspect it?
A. Yes, sir.
9 Q. Where did you inspect it?
A. Right there near the C. & O.; cut loose from it there.
10 Q. Standing on the track?
A Yes, sir.
11 Q. Were there any horses in it when you inspected it?
A. I didn't go inside.
12 Q. Were the doors closed?
A. I don't think they were.
13 Q. What car did you inspect.

Plaintiffs object to further testimony with reference to this car.

14 Q. Was the car in good order?
A. Yes, sir.
15 Q. Do you remember seeing any attendants looking after the horses that were set up in the car?

Plaintiffs object; which objection is sustained by the court; to this ruling of the court defendant excepts.

462 16 Q. Did you see any men connected with that car?

Plaintiffs object; which objection is overruled by the court; to this ruling of the court plaintiffs except.

17 Q. State if anyone accompanied that car?

A. Not at that time. I didn't see any attendants with it, but later on, after the L. & N. train put it on the train, I did see the attendants with it.

18 Q. Where did you see these attendants?

A. After they put it on the head end of the train.

19 Q. Where did they put it on that train?
A. Next to the engine.
20 Q. Describe those two men?
A. One was a yellow boy. It was night and I could not swear whether he was a white man or a darkey, but the other one was a darkey.
21 Q. About what size was that yellow fellow?
A. I suppose weighed about 135 or 140, and the other man might have been a little heavier.
22 Q. Where did you see these men?
A. I seen them come down through the yard after that. I then seen them when the train left there, I seen them on the train laying in the car on a pile of hay.
23 Q. What time, with reference to the time the train started, was it you first saw these men?
A. I could not say.
24 Q. About how long?
A probably an hour or maybe not so long.
463 25 Q. Well, after you first saw them, where did they go?
A. They were going towards the car then when I first saw them in the other part of the yard. They were going down towards the lower part where the car was.
26 Q. When you next saw them, where were they?
A. They were in the car laying on the hay.
27 Q. How did you see them?
A. I was adjusting the car and passed by the door, of course, and they were laying in there.
28 Q. They were lying together?
A. They wasn't very close together, and they wasn't very far apart. There was a good deal of hay in the center of the car and they were laying there on it.
29 Q. And you looked through the door and saw them?
A. Yes, sir.
30 Q. Through which door?
A. Right-hand door next to the engine.
31 Q. Was the door in the direction of Lexington, or in the direction of Louisville?
A. It was the middle door in the middle of the car that I seen them. They were laying in the middle of the car. There are side doors on them cars, you know.
32 Q. Yes there are two side doors——

Plaintiffs object; which objection is sustained by the court.

33 Q. How many doors were on the side of that car?
A. Well, there is double doors on the car doors that folds back. There is two doors hangs on each side of the door. Posts, little doors, and space there that wide and then that doubles back twice and opens.
464 34 Q. How many are there on the side door openings?
A. Only what you would call one opening.
35 Q. Where is that one?

A. About the middle ways of the car?

36 Q. Was that an Arms Palace car you were looking at?

A. Yes, sir.

37 Q. Now, when you first saw them, did you say anything to them, the way they was acting?

A. They were hollering and going on.

38 Q. What were they saying?

A. A little of everything, I did not follow them up to ask them what they were saying.

39 Q. How loud were they hollering?

A. I was looking after my business and of course I heard and seen them.

40 Q. How loud were they hollering?

A. Just ordinary hollering and whooping and going on.

41 Q. In your opinion were they drunk or sober?

A. They were drunk.

42 Q. Both of them?

A. Both of them, from the way they were going on.

43 Q. The last time you saw them they were in the car?

A. Yes, sir.

44 Q. How long was that after the first time you saw them before the train pulled out?

A. Probably half an hour or hour, or hour and a half, I cannot tell, I don't recall the time that the C. & O. delivered that car to us. I don't recall the exact time the train left, although I adjusted the car on the train and as soon as I got through adjusting the car they generally pulled right out.

45 Q. You didn't see them any more at all, you say, until you saw them in the car?

A. No, sir.

46 Q. They were then asleep, or did you know?

465 A. I don't know whether they were asleep or not.

Cross-examination:

1 Q. How long was the last time you saw them before the car pulled out?

A. Well, now, I could not exactly say, I could not keep the time.

2 Q. As near as you can get at it? I don't think you can, myself, but as near as you can.

A. Probably 10 or 15 or 20 minutes.

3 Q. Or 30?

A. It could not have been that long.

4 Q. May have been 20 minutes.

A. May have been 20 minutes.

5 Q. That was the last time you saw them before the car pulled out?

A. Yes, sir.

6 Q. What were they doing at that particular moment?

A. Laying on the hay in the car.

7 Q. They were hollering and whooping then?

A. No, sir.

8 Q. They were quiet?
A. Yes, sir.
9 Q. Nobody around?
A. Yes, sir.
10 Q. Are you still working for the L. & N.?
A. Yes, sir.

VEENAMAN, A. H., who having been first duly sworn, testified as follows on behalf of defendant:

1 Q. Where do you live?
A. Louisville.
2 Q. Where were you living in December or about Decem-
466 ber 3rd of last year?
A. In Louisville.
3 Q. What was your occupation at that time?
A. At that time I was employed by the L. & N. Railroad Co. as Assistant Law Agent.
4 Q. Do you recall the circumstances of some horses being burned in a car? Burned on the night of the 17th of November, 1910?
A. Yes, I made most of the investigation.
5 Q. Do you remember having any conversation with a man by the name of Chester Frakes, in the process of that investigation?
A. Yes, sir.
6 Q. What sort of a man was he, what color?
A. Well, there was two colored boys at this time. Of course I don't remember their names. But I remember one of them almost looked like a white man and the other one was about as dark or maybe a little darker than the usual negro.
7 Q. Let us take the darker one, then; can you recall whether his name was Frakes, or not. What were their names?
A. It would be a mighty hard thing to remember the names, but now I do remember that one of their names was Frakes. But to remember that without having my attention called to it, I could not remember that far back.

COUNSEL FOR DEFENDANT: I would like to have Frakes brought in. (Which is done.)

8 Q. Would you remember the man if you were to see him?
A. Yes, sir.
9 Q. Here is one of the men, do you identify him?
A. Yes, that is the one that was the lightest of the two.
10 Q. Do you identify him?
A. Yes, sir.
467 11 Q. Did you have any conversation with him during the process of that investigation?
A. Yes, sir; I went out here to the race track on the car line. The running track.
12 Q. I will ask you whether during the process of that investigation, in the conversation with Mr. Frakes, he made to you a statement that he had drunk two glasses of beer that day with Horace?
A. Yes, sir.

13 Q. Did you tell that man on that occasion, or any occasion, that you represented Mr. Franklin?

A. No, sir.

14 Q. When did you first learn, if at all, that Mr. Franklin had anything to do with this action?

A. As well as I can now remember, it was at the time the suit was brought. I didn't know any suit was going to be brought.

Plaintiffs object; which objection is overruled by the court; to this ruling of the court plaintiffs except.

A. (continued). I didn't know at that time there had been any attorney employed in the case.

15 Q. And didn't you know whether any suit had been brought then?

A. No, sir.

Cross-examination:

1 Q. Is that all the conversation you had with him?

A. No, sir, I obtained a statement from both boys.

2 Q. You did?

A. Yes, sir.

3 Q. Where is the statement?

468 A. The statements, after I got them I put them with the other statements I obtained in the case, made out a report and reported to the chief law agent.

4 Q. Would you know it if you were to see it again, whether it has been changed since then or not?

Defendant objects; which objection is sustained by the court; to this ruling of the court plaintiff- excepts.

5 Q. Have you told all that that boy said to you in his conversation?

A. No, I haven't told it all because I haven't had time. I took a statement from both boys, about a page long. Got all the facts in the case.

6 Q. Did you get all the facts?

A. Yes, as I thought had any bearing in regard to the accident.

Redirect examination:

Q. 1. Is Horace Moore the other man? Did you know him? Go Devil they call him?

A. I think I recognized the other boy out in the hall this morning, but I could not say for sure he was the boy. But I remember seeing two of the boys out in the hall.

COUNSEL FOR DEFENDANT: Bring in that other colored man, will you?

WITNESS: I think they were all small built boys.

COUNSEL FOR DEFENDANT: Bring in Go Devil.

2 Q. Turn around there and look at that gentleman, Mr. Go Devil.

A. Yes, I see him.

3 Q. You identify that man?
A. That is the one I referred to seeing in the hall. That is the one I had reference to.
469 4 Q. I will ask you where did you have a conversation with him?
A. At the same place I had with the other boy out at the stable,—race track.
5 Q. Do you remember at the time that talk took place?
A. I know it was in cold weather. We had a hard time to get out there. The cars were cold.
6 Q. Was it in December of last year?
A. Either the latter part of November or the first part of December.
7 Q. Where did you have an interview with him?
A. Place where that stable boy of his slept.
8 Q. Did he state to you in that conversation that he had had two glasses of beer, that they had one at Covington and one at Lexington before dinner?
A. Yes, sir.

Recross-examination:

1 Q. Is that all this boy said to you, this black one?
A. All that either boy told me about the accident was in the statements.
2 Q. I am asking you if that is all this black boy said to you?
A. No, he made a statement like the other boy did, of everything that took place from the time he left Covington.

SMITH, J. M., Who having been first duly sworn, testified as follows on behalf of defendant:

470 1 Q. What is your occupation?
A. Chief Clerk of the L. & N. Freight depot.
2 Q. How long have you been occupying that position?
A. Just about two years.
3 Q. What was your occupation on the 17th of November, 1910?
A. Same as it is now; Chief Clerk.
4 Q. In whose handwriting is that entry made? (Showing him a paper.)
A. A young fellow by the name of Johnny Gearing.
5 Q. Where is he?
A. He was in town. I saw him in town about a week ago. He left us about three weeks ago.
6 Q. Do you know where he is now?
A. No, I don't.
7 Q. Do you know whether he is in town?
A. No, sir; I don't.

GAINES, ROBERT, who being first duly sworn, testified on behalf of the defendant as follows:

1 Q. I want to ask you whether this is the kind of lantern that was in those cars? (showing him a lantern.)
A. Yes, sir.
2 Q. Just exactly the kind of lantern you had?
A. Except this ring. I don't think this ring was in there. But it is this kind of lantern.

471 Counsel for defendant offers the lantern in evidence, to which the plaintiffs except.

3 Q. If there is any difference, explain to the jury if there are any other differences?
A. I don't see any. What do you mean? Let me have it closer and look at it.

Counsel hands it to the witness and says: "It came from the same place as you all said you got this."
Counsel for plaintiff- excepts to that statement and asks that it be excluded from the jury. After looking at the lantern the witness is asked——

Q. 4. What do you say now?
A. I say it is the same kind of lantern. Looks to me like it is, if this is a No. 2.

COUNSEL FOR DEFENDANT: I don't know about it.
COUNSEL FOR PLAINTIFF-: Then we have no objection to its going in.
Counsel for defendant here offers the contract which has heretofore been put in and which is considered read. Said contract is the same that was filed at the end of plaintiffs' evidence, on page 286, Vol. 1.

472 IRELAND, J. T., who being first duly sworn testified as follows on behalf of the defendant.

1 Q. I desire to ask you what insurance, if any, you had upon these horses?

Plaintiffs object.
The COURT: I will pass on that question later.

Defendant herein announced this case closed except as to above ruling, and thereupon the plaintiffs introduced in rebuttal the following witnesses.

JENKINS, WILLIAM, who being first duly sworn testified in rebuttal on behalf of the plaintiff- as follows:

1 Q. Where do you live?
A. 212 Walton Avenue.
2 Q. Do you hold any official position?
A. Yes, sir, night chief of police in Lexington.
3 Q. Are you acquainted with one Ida Wilson?

A. Yes, sir, I know Ida Wilson?
4 Q. How long have you known Ida Wilson?
A. 15 or 18 years.
5 Q. Are you acquainted with her general reputation in the community in which she resides, among the people with whom she associates, for truth and veracity?
A. Yes, sir.
473 6 Q. What is that reputation; good or bad?
A. Bad.
7 Q. Are you acquainted with her general reputation in the community where she resides, and among the people with whom she associates, for chastity and virtue?
A. Yes, sir.
8 Q. What is that reputation?
A. Bad.
9 Q. Are you acquainted with her general reputation—her general moral reputation in the community where she lives and among the people with whom she associates?
A. Yes, sir.
10 Q. Is it good or bad.
A. Bad.
11 Q. Do you know one Mamie Kelly?
A. Yes, sir.
12 Q. For how long have known her?
A. 10 or 12 years.
13 Q. During any portion of that time did she live in Lexington?
A. Yes, sir.
14 Q. While she was a resident of Lexington were you acquainted with her general reputation in the community where she lived and among the people with whom she associated, for truth and veracity?
A. Yes, sir.
15 Q. What was that reputation, good or bad?
A. Bad.
16 Q. Were you acquainted with her general reputation in the community where she lived and among the people with whom she associated, for chastity and virtue?
A. Yes, sir.
474 17 Q. What was that reputation?
A. Bad.
18 Q. Were you acquainted with her general moral reputation in the community where she lived and among the people with whom she associated while she lived in Lexington?
A. Yes, sir.
19 Q. Was that reputation good or bad?
A. Bad.

OVERLY, CHAS. H., who being first duly sworn testified in rebuttal on behalf of plaintiff as follows:

1 Q. Your name is Charles H. Overley, I believe?
A. Yes, sir.
2 Q. Do you now hold any office in the City of Lexington?

A. I am a lieutenant of the police.
3 Q. How long have you held that office?
A. I have been on the police force over 16 years and have been lieutenant for 10 or 12 years.
4 Q. Are you acquainted with Ida Wilson?
A. Yes, sir.
5 Q. How long have you known her?
A. 10 or 12 years.
6 Q. Are you acquainted with her general reputation in the community where she lives and among the people with whom she associates for truth and veracity?
A. Well, I guess I am, about as well as anybody.

Defendant objects.

475 7 Q. Can you answer that positively, whether you are or not?
A. Yes, sir.
8 Q. Is that reputation good or bad?
A. Bad.
9 Q. Are you acquainted with her general reputation in the community where she lives and among the people with whom she associates, for chastity and virtue?
A. Yes, sir.
10 Q. What is that reputation, good or bad?
A. Bad.

Defendant objects; which objection is overruled by the court; to this ruling of the court defendant excepts.

11 Q. Are you acquainted with the general moral reputation of Ida Wilson in the community in which she lives and among the people with whom she associates?

Defendant objects, which objection is overruled by the court; to this ruling of the court defendant excepts.

A. Yes, sir.
12 Q. What is that general moral reputation?
A. Bad.
13 Q. Do you know Mamie Kelly?
A. Yes, sir.
14 Q. Has she ever lived in Lexington?
A. Yes, sir.
15 Q. Did you know her while she lived here?
A. Yes, for a long time, 10 or 15 years.
476 16 Q. While she lived in Lexington, were you acquainted and did you know her general reputation in the community in which she lived and among the people with whom she associated, for truth and veracity?
A. Yes
17 Q. What was that reputation, good or bad?
A. Bad.
18 Q. Were you acquainted with her general reputation for chastity and virtue or the contrary?

Defendant objects; which objection is overruled by the court; to this ruling of the court defendant excepts.

A. Yes.
19 Q. What was that, good or bad?
A. Bad.
20 Q. Were you acquainted with her general moral reputation in the community in which she lived and among the people with whom she associated or not?

Defendant objects; which objection is overruled by the court, to this ruling of the court defendant excepts.

A. Yes, sir.
21 Q. Was that reputation good or bad?
A. Bad.

477 SALTER, RICHARD, who having been first duly sworn testified in rebuttal on behalf of the plaintiff as follows:

1 Q. Where do you live?
A. Covington.
2 Q. What is your business?
A. Police officer.
3 Q. How long have you been a police officer?
A. About 11 years.
4 Q. Do you know one Mamie Kelly, who has testified in this action for the defendant the L. & N. R. R. Co.?
A. I do.
5 Q. How long have you known Mamie?
A. About since 1909.
6 Q. Do you know where she lives?
A. No. 6 McVey Alley, Covington.
7 Q. Are you acquainted with her general reputation in Covington and in the community where she lives and among the people with whom she associates, for truth and veracity?
A. I am.
8 Q. What is that reputation, good or bad?
A. Very bad.
9 Q. Are you acquainted with her general reputation in that community where she lives, and among the people with whom she associates, for chastity and virtue, or the contrary?

Defendant objects; which objection is overruled by the court; to this ruling of the court defendant excepts.

A. Yes, sir.
478 10 Q. Tell the jury what that reputation is?
A. Very bad.
11 Q. Are you acquainted with her general moral reputation in the community where she lives and among the people with whom she associates?
A. I am.

Defendant objects; which objection is overruled by the court; to this ruling of the court defendant excepts.

12 Q. What is it?
A. Very bad.

Cross-examination.

1 Q. Who did you hear talk about Mamie's reputation for truth and veracity?
A. I guess I have heard over 100 people.
2 Q. Name some of them?
A. Yes, I could tell the names of them. Almost every police officer in the city of Covington, almost every merchant or business man that has any business to amount to anything where she lives.
4 Q. I asked you the names. I did not ask you who the police were or what the police had done. Give me some of the names?
A. Well, I would say William Picket for one.
5 Q. What was the occasion that you heard Mr. Picket?
A. On her character and general reputation.
6 Q. I asked you for truth and veracity?
A. In different dealings he had with her he said he could not believe her on any subject.
479 7 Q. You heard him say it?
A. Yes, sir. Many of them.
8 Q. Have you heard the community generally, say among the people with whom she lived?
A. Yes, sir.
9 Q. Who else?
A. I would say Henry Brink.
10 Q. Just to you?
A. Yes, it *it* my business.
11 Q. Is it generally discussed among the people—that woman's repitation for truth and veracity?
A. Yes, sir, more so than any other woman who ever lived in the city of Covington.
12 Q. She must be a woman of some importance.
A. She is.
13 Q. And she is of such importance that she is generally discussed in this way?
A. Yes, even the best takes notice of her character and her doings.
14 Q. What do you understand by reputation?
A. What the public or people at large think of you.

COUNSEL FOR THE DEFENDANT: We have what the witness' idea is of reputation, so I object to the whole testimony. Which objectio nis overruled by the court; to this ruling of the court defendent objects.

WEBB, J. F., Junior, who being first duly sworn, testified in rebuttal on behalf of plaintiffs as follows:
1 Q. Where do you live?
A. Frankfort now.
480 2 Q. Where were you living on Nov. 17, 1910? At midnight?

A. Capitol Hotel.
3 Q. What is your business there?
A. Night Clerk.
4 Q. Do you know Chester Frakes, this boy who has testified here?
A. I know him when I see him.
5 Q. Do you know this black boy Horace Moore, who has testified here?
A. That fellow up there? Yes, sir.
6 Q. Did you see them on the night of Nov. 17th, 1910, or in the morning of Nov. 18th, 1910, at Frankfort, Ky.?

Defendant objects; which objection is overruled by the court; to this ruling of the court defendant excepts.

A. Yes, sir.
7 Q. What time did you see them?
A. I saw them about a quarter of one.
8 Q. Where?
A. In the office or lobby of the Hotel there.
9 Q. Was there anyone present there besides yourself, when you saw them?
A. Only the bell boys.
10 Q. Did some other persons come there very shortly—Do you know Mr. Dulin Moss?
A. Moss, the reporter?
11 Q. What was the condition of Horace Moore, the black boy, when you saw him there?

Defendant objects; which objection is overruled by the court; to this ruling of the court defendant excepts.

481 A. When he came in he wasn't hurt like the other one——
12 Q. I asked you what was his condition. Was he drunk?

Defendant excepts.

A. No, sir, he was not when he came in to me, he was not.
13 Q. What evidence did he give of bring drunk? Anything? or being under the influence of liquor any?
A. None whatever.

Defendant excepts.

14 Q. What about the other boy, Chester Frakes?

Defendant excepts.

A. He wasn't there.

Defendant excepts.

15 Q. Tell what that boy did there, Chester Frakes, all the opportunity you had to know whether he was drunk or drinking?

Defendant objects; which objection is sustained by the court; to this ruling of the court plaintiff excepts.

16 Q. You say he was sober?
A. Yes, sir.

Cross-examination.

1 Q. What hour was that, Mr. Webb?
A. About a quarter of one or 10 minutes of, somewhere around there.
2 Q. How did you come to recall the time?
A. Because I noticed the clock and the time I put in a call for him.
3 Q. That was after the fire had occurred?
482 A. I suppose it was, yes, sir.
4 Q. This fire that had occurred in Frankfort, West Frankfort,—how far is it from the hotel over to West Frankfort where the accident happened?
A. I don't know where the car burned. I never saw the car, I have no idea how far it was.
5 Q. It was at the Capitol Hotel where he come to you?
A. Yes, sir.
6 Q. How far would you say it is to the place in West Frankfort in the yards of the L. & N. road, at which this accident was said to have occurred;—how far is it down to the bridge from the Capitol Hotel?
A. I expect about five or six squares on this side of the bridge.
7 Q. How long are those squares?
A. I don't know.
8 Q. The best you can.
A. Well, about, I should think, 200 or 300 feet.
9 Q. That is a pretty wide margin. Which would you say was the nearest; would you say 300 or 200?
A. I expect about 300 feet.
10 Q. How many squares?
A. About six from this side of the bridge, that is, before you cross the river.
11 Q. How long is the bridge?
A. I don't know. I have no idea.
12 Q. 400 feet?
A. I could not say.
14 Q. You don't know?
A. No, sir.

483 Moss, DULIN, who being first duly sworn testified on behalf of the plaintiff, in rebuttal, as follows:

1 Q. Where do you live?
A. Frankfort.
2 Q. Where did you live on Nov. 17, 1910, at midnight?
A. Frankfort.
3 Q. Do you know Chester Frakes who has testified on this trial, when you see him?
A. Yes, sir.

4 Q. Do you know Horace Moore, the black boy who has testified in this case, when you see him?

A. Yes, sir.

5 Q. Did you see either of these boys about midnight of Nov. 17, 1910, or the morning of the 18th at Frankfort?

Defendant objects; which objection is overruled by the court; to this ruling of the court defendant excepts.

A. Yes, sir.

6 Q. Where did you see him?

A. I saw them in the Capitol Hotel first, in the lobby of the Capitol Hotel first, that morning.

7 Q. At what time?

A. Well, I think it was about one or half past; somewhere along in there. One or half past, somewhere along in there in the morning.

8 Q. Of what day.

A. It was the day these horses were injured. I don't know what day it was.

484 9 Q. Tell the jury the extent to which they, or either of them, was under the influence of liquor?

Defendant objects; which objection is overruled by the court; to this ruling of the court defendant excepts.

A. Well, I don't think either of them was under the influence of liquor.

10 Q. Did you have an opportunity to observe?

A. Yes, I had an opportunity to observe.

11 Q. Tell the jury what opportunity you had to observe?

A. Well, the tall negro was the negro that was burned, and I got close up to his face to examine his face and I could not smell any trace of liquor and he didn't act like a drunken man in any way. He acted very intelligently and seemed to know his business. Seemed to know what he was doing and what he wanted to do, but in my judgment he was not intoxicated at all; hadn't had anything to drink.

12 Q. What about the black one?

A. Well, now, I didn't see so much of the black one. But I asked him some questions about the horses, as I recall now, and he answered very intelligently. I sent my report here to the newspaper, and the answers he gave me to the questions that I asked him——

Defendant objects; which objection is sustained by the court; to this ruling of the court plaintiffs except.

13 Q. What is your business?

A. Newspaper reporter.

14 Q. You did have a conversation with him?

A. Yes, sir.

485 1 Q. What time of night was it exactly, Mr. Moss, as near as you can come to it?

A. I would say about one or half past, that is as near as I can recollect.

2 Q. Where were you?
A. In the lobby of the Capitol Hotel.
3 Q. That was a late hour for a newspaper man?
A. Not for me. Because I very rarely ever go to bed before three o'clock in the morning. I work for morning newspapers and have to be up all night.
4 Q. Did you know how far it is from the Capitol Hotel down to the train in which the horses were burned, before you went there to see where the car was?
A. Yes, sir.
5 Q. Well, now, from the Capitol Hotel, or the reverse, how far is it from that car up to the Capitol Hotel; what is the distance?
A. About as far as from here down to West Main Street to the first L. & N. track, I judge. There are two ways to go there from the Capitol Hotel; one to go down around the road and the other to go around Broadway and go across the bridge. The bridge-way is the nearest way.
6 Q. To go the way they usually go with horses? Now, how far would you say in feet and yards was it?
A. Well, I would think three-quarters of a mile, somewhere along there.
7 Q. Now, what was the temperature at that time, about that hour?
A. Pretty chilly.
486 8 Q. These people, when you saw them in the hotel, had walked over from that place up to the hotel?
A. I judge so.
9 Q. And the weather was pretty chilly?
A. Pretty chilly; yes, sir.
10 Q. The fire had occurred and they had come from it?
A. Yes, sir.

WOODFORD CATESBY, who being first duly sworn, testified in rebuttal on behalf of plaintiffs as follows:

1 Q. On Nov. 17, 1910, did you have any opportunity of knowing whether or not Chester Frakes was drunk or sober?
A. I did.
2 Q. What opportunity had you?
A. Well, about one o'clock, not more than five minutes after one, he called me up from Frankfort by telephone.
3 Q. Did you have a conversation with him?
A. I did.
4 Q. What was the length of that conversation?
A. I suppose it must have been five minutes.
5 Q. Was Chester Frakes drunk or sober when he was talking to you?

Defendant objects.

A. I think absolutely sober.

Cross-examination.

1 Q. You were talking to him? Where?
A. In my home.
2 Q. Where was your home?
A. Near, Paris, Ky.
487 3 Q. How far out of Paris?
A. Two miles and a half.
4 Q. What is the distance by telephone from your home—do you know where he was talking from?
A. He was talking from Frankfort.
5 Q. Well, I don't mean to be exact, but about what is the distance?
A. It is about 20 miles from my house to Lexington, where the wires go from here to Frankfort. I suppose 25 miles, I don't know just the distance.
6 Q. What was the temperature about the time you were talking to him?
A. I remember a cold and frosty night. But I didn't go out doors, I was in my house where it is quite pleasant.
7 Q. And your opinion as to the sobriety of Mr. Frakes was based upon your conversation with him at that hour of the night over the telephone?
A. Yes, sir.
8 Q. What time was that, as near as you can put it?
A. One o'clock. Just about one o'clock. I noticed by the clock. My clock was one o'clock.
9 Q. Sun time or car time?

HAMILTON, J. B., who being first duly sworn, testified in rebuttal on behalf of plaintiffs as follows:

1 Q. Where do you live?
A. Frankfort.
2 Q. What is your occupation?
A. On the police force there.
3 Q. How long have you been so engaged?
488 A. Six years, will be the first of January.
4 Q. Were you on duty on the 17th day of November, 1910?
A. Yes, I was at the police headquarters.
5 Q. Do you know this yellow boy that testified here on this trial?
A. Only when I see him. I saw him at the stable when he brought the horses there.
6 Q. About what time of night was that?
A. A little after twelve. Some time between 11 and 12.
7 Q. Was he drunk or sober?
A. Sober.
8 Q. Did you see this black boy?
A. I didn't pay much attention to the black boy, because he was jumping around there, and was paying attention to the yellow boy, because he was burned and I was looking at burns on his head.

9 Q. Why was it you saw the black boy, if you had an opportunity,—what did you see about him?

A. I don't know about the black boy. I don't know whether he was drunk; I just saw him around the stall. I didn't know he was one of them. I saw him and they said he was one.

10 Q. Was there anything about his conduct that made you suppose that he was drinking?

A. I don't think he was drunk, from the way he was working around the stalls there.

Cross-examination.

1 Q. You say he brought those horses to the stable about eleven o'clock?

A. No, it was after eleven, I think between 11 and 12, but I could not say exactly the time. I stayed at police headquarters and

489 Mr. —— came up there and said——

2 Q. Never mind about that—did you look at the clock that time?

A. Yes, when I got doen there Dr. Seay, Pat Lillis, and I believe Moss, came in directly after, and they brought this one sorrel horse out that was burned over his head, and they put medicine on his head, and after they got through that they were going over to the car at West Frankfort and they asked me to go over with them, and I went.

3 Q. How far is it from that stable over to the car?

A. Must have been I would suppose from one to one and a half miles; about somewhere along there.

4 Q. To the car from the stable?

A. Yes, sir.

5 Q. The stable was on Ann St.?

A. It is on Main Street just around the corner from Ann Street.

6 Q. What kind of night was it?

A. It was on Sunday night; it was right tolerably cool, I know I got a little cold over at the car, before I left them and come away.

7 Q. Do you know how the boys had gotten there from the car?

A. No, sir; I don't know anything about it; didn't see the horses when they were brought.

8 Q. You went to the car yourself?

A. I went with those fellows there to the car.

9 Q. And you don't know whether these men had gone there or not?

A. I don't know how they got there?

10 Q. Tolerably cool? About what was the temperature?

A. I know it was very—it was just a little cool in the night, you know.

490 11 Q. Night of Nov. 17th?

A. Yes, sir.

GRISSOM, HENRY, who being first duly sworn, testified on behalf of the plaintiffs, in rebuttal, as follows:

1 Q. Where do you live?
A. Frankfort.
2 Q. Where did you live in November,—Nov. 17, 1910?
A. 624 Ohio St., Frankfort.
3 Q. What you were employed at that night?
A. Night watchman at Rogers & Manford Livery Stable.
4 Q. Where is that Livery stable?
A. Main Street, across from the Capitol Hotel.
5 Q. Do you remember some horses being brought in there that night?
A. Yes, sir.
6 Q. Do you remember what time they brought them in there?
A. About half past twelve.
7 Q. Do you know who brought them?
A. Some freight men and the boys who were with them.
8 Q. Do you know these boys when you see them?
A. Yes, sir.
9 Q. Who were they?
A. I think they call one Chester and the other they call Go Devil.
491 10 Q. Go Devil? Is he the black one?
A. Yes, sir.
11 Q. Chester is the yellow one?
A. Yes, sir.
12 Q. When they came in there were they drunk or sober?
A. They were sober.
13 Q. Did you have an opportunity to find out whether they had been drinking.
A. No, sir, I did not.
14 Q. Do you know what they were when they got there?
A. Yes, sir.

Cross-examination.

1 Q. That was you say at 12:30?
A. 12:30.
2 Q. Or later, which?
A. Between twelve and one. Half past twelve when they got in there.
3 Q. Mr. Henry, how far is it from where the livery stable was, that these horses were brought to, and where you were night watchman, down to the cars—do you know which way they brought these horses from?
A. Yes, they came up Broadway to Ann and came up Ann to the livery stable.
4 Q. Is that livery stable across the street from the Capitol Hotel.
A. Yes, sir.
5 Q. Now, they came up Broadway—that is the street the L. & N. railway track is on?

A. Yes, sir.

492 6 Q. And then which way did they go?

A. Turned to the right and came up Ann Street and then turned to the left and came up to the stable.

7 Q. Did you go to the car?

A. No, sir.

8 Q. Do you know where it was?

A. No, sir.

9 Q. How far is it generally called from the livery stable to the East end of the bridge?

A. This end or the far end?

10 Q. This end.

A. I don't know, sir; it ain't quite a half mile, I don't reckon.

11 Q. How long is that bridge, do you know?

A. No, sir.

LILLIS, PAT, who being first duly sworn, testified in rebuttal on behalf of plaintiffs as follows:

1 Q. What was the hour when you first saw Chester Frakes and Horace Moore at Frankfort, the night these horses were there?

A. These two colored men?

2 Q. Yes.

A. About one o'clock.

3 Q. When you saw them, were they sober or drunk?

A. They looked to be sober, to me.

4 Q. Did you notice anything about them at all to indicate they had been all drinking, or were, to any extent under the influence of liquor?

A. No, sir.

493 Cross-examination:

1 Q. Where did you first see them?

A. At Frankfort, at the livery stable

2 Q. Do you live now in Frankfort?

A. Yes, sir.

3 Q. How long have you lived there?

A. 49 years.

4 Q. How far is it from that livery stable up Ann Street down West out of Broadway street, across that bridge to where the car was in which the horses were burned—you testified before that you had been to that car—how far is that?

A. I would judge between ¾ of a mile and a mile.

5 Q. What was the character of the weather, as to being warm or cool that night?

A. Rather chilly.

6 Q. You saw these boys when they got to the livery stable?

A. No, sir, I saw them at the livery stable.

7 Q. They were all in the livery stable when you say them—you saw them first about one o'clock.

A. Yes, I would judge that was about it.

8 Q. And the weather was chilly—you stated it was between ¾ and a mile from the livery stable to where the car was?
A. I should think so; yes, sir.

SEAY, Dr., who first being duly sworn testified as follows on behalf of the plaintiffs in rebuttal:

1 Q. The night at Frankfort, when you saw those boys with the horses that were burned, did you have any opportunity of knowing whether or not Chester Frakes was drunk, or had recently been drunk?
A. Yes, sir.
494 2 Q. Was he drunk?
A. He was not, sir.
3 Q. What opportunity had you to know whether or not he was?
A. Well, the boy was burned around the ears and eyes, and corner of the nose, and I told him to open his mouth and let me see in. I suppose my nose was within 4 inches of his mouth and I could not smell a drop of anything.
4 Q. What did he have his mouth open for?
A. So I could see down his throat. I wanted to see how bad he was burned. The next day Mr. Ireland and I had him sent to the Specialist at Frankfort, he was complaining quite a great deal with his burns here and around his nose.
5 Q. Was the black boy drunk?
A. No, sir, I think not. I never had as close inspection of him as I did the other.

Cross-examination:

1 Q. What time of night was it when you first saw them?
A. I got up about half past twelve I would say about a quarter to one o'clock I got to the stable.
2 Q. You talked to them there?
A. I suppose, yes, sir.
3 Q. What was the temperature?
A. It was chilly, very cool, sir.
4 Q. How did they go to the livery stable, do you know?
A. I don't know, sir; they were at the stable when I got there. I suppose they walked or led them, I don't know.
5 Q. How far was it from the livery stable to where the car was in which those horses were burned?
A. I could not tell you exactly. Fully half a mile; between half and three-quarters I would say.

495 Re-direct examination:

1 Q. If they had been drunk when they started from this car with these horses, would — have discovered the fact on Chester Frakes breath, when you examined him there?
A. I think so, sir.

GORDON, FRED L., who being first duly sworn, testified in rebuttal on behalf of the plaintiffs, as follows:

1 Q. I don't remember just what you said about the time you said you saw these boys with the horses that night?
A. A little after twelve, I think.
2 Q. Were they drunk or sober?
A. They were sober.
3 Q. Does that apply to both of them, the yellow and black one?
A. Yes, sir; there were three colored boys there.

Cross-examination:

1 Q. Three?
A. Yes, sir.
2 Q. What was the name of the other one?
A. I don't know either of their names?
3 Q. What color was the other one?
A. Tall dark one.
4 Q. Ever see him any more?
A. I never did; might have been a railroad nigger.
5 Q. Did you ever hear his name?
A. No, sir.
496 6 Q. Do you know where he went after that?
A. No, sir.
7 Q. And don't know where he came from?
A. No, sir.
8 Q. Don't know what business he was in?
A. No, sir.
9 Q. Don't know what business he had being there?
A. No, sir.
10 Q. What time do you say it was now?
A. I think after 12.
11 Q. How much after twelve.
A. Between twelve and one.
12 Q. Can't you come nearer than that?
A. Might have been a quarter after twelve.
13 Q. Might have been half past, might have been three-quarters?
A. As near as I can remember, half past twelve.
14 Q. What kind of night was that?
A. Clear night, cold.
15 Q. You walk down there many and many a time, I reckon—how far is it from the livery stable, to go down Ann Street and West out Broadway to where that car was in which these horses were burned?
A. I suppose it would be a mile.
16 Q. No more?
A. Might be more; I couldn't tell exactly.
17 Q. Yes, it might be and might not be—I am not after might; you are a policeman and have walked it——
A. I won't state positively.
18 Q. Why?

A. Because I don't know.

497 19 Q. You won't put it any further than it might be a half mile?

A. Might be three quarters.

20 Q. Might be a mile, might be five miles, might it not?

A. No, sir.

21 Q. You are a policeman, how long have you walked that beat?

A. Wait a minute, I can tell you how many squares it is to the bridge—six squares to the bridge.

22 Q. And how far did you say across that bridge to where the car was?

A. Between four and five hundred yards.

23 Q. What is the width of those squares?

A. They are about four hundred feet.

24 Q. That makes 3900 feet you put it?

A. As near as I can put it.

LEWIS, W. L., who being first duly sworn, testified in rebuttal on behalf of the plaintiffs as follows:

1 Q. You have testified about these boys helping to load the horses on the car at the track in the afternoon of Nov. 17, 1910—about what time was it that they were engaged at that work,—Chester Frakes and Horace Moore?

A. A little after five until about a quarter of six. I think between five and six o'clock they were loading.

2 Q. Did you have an opportunity to observe them there as they were about their work?

A. Yes, sir.

498 3 Q. Was either of those boys drunk?

A. No, sir.

4 Q. Anything about either one of them to indicate that he was at all under the influence of liquor?

A. No, sir, nothing at all at that time.

Cross-examination:

1 Q. That was the last you saw of them?

A. Yes; I left there about a quarter or ten minutes of six.

2 Q. And you didn't see those boys any more on that occasion?

A. No, sir.

3 Q. And the next time you saw them was some time after the accident?

A. Several days after that.

GAINES, ROBERT, who being first duly sworn, testified as follows, in rebuttal, on behalf of plaintiffs:

1 Q. What time would you say you left the car out at the shute when these horses were loaded?

A. About half past seven.

2 Q. Did you see Chester Frakes and Horace Moore at that time?

A. Yes, sir.

3 Q. About what part of that afternoon were they there about the track or at that car loading those horses?

A. Well, they were around the track at about two o'clock; from two on up to four, they began to make preparations to take the horses and traps to the car.

499 4 Q. Did they assist in that?

A. Yes, sir.

5 Q. And during that time how long were they there about the car?

A. From four o'clock.

6 Q. Yes?

A. Why I left them at the car at half past seven.

7 Q. Had they returned there during that period?

A. Yes, sir.

8 Q. Did you have an opportunity that time to observe whether they were drinking or under the influence of liquor?

A. Yes, sir.

9 Q. Tell the jury whether Chester Frakes and Horace Moore were drunk or at all under the influence of liquor at the time they were at the track until you left them about half past seven?

A. No, sir, they didn't have any liquor about them at all, that I could discover. I was around with them all the time from two O'clock until I left them going to the stable; at two, they notified me they had to go and load the horses and at four o'clock they came back and loaded the horses. They were there from four o'clock until half past seven and there was no whiskey about them as far as I could see.

Cross-examination:

1 Q. You left them about half past seven?

A. Yes, sir.

2 Q. Whereabouts?

A. In the car at the platform here at the race track.

3 Q. When did you next see them?

A. The next time I saw them was on Monday after the accident.

500 IRELAND, J. T., who being first duly sworn, testified in rebuttal on behalf of the plaintiffs, as follows:

1 Q. I believe you testified in chief that you were out at this car while the horses were being loaded a portion of the time?

A. Yes, sir.

2 Q. How long were you there?

A. I was out there two or three times in the afternoon.

3 Q. Were these boys, Chester Frakes and Horace Moore, out there during that afternoon?

A. I saw them two or three times.

4 Q. About what time did you see them at the car?

A. About five o'clock when I left there.

5 Q. Had you opportunity to observe and know whether or not either of them was drunk, or at all under the influence of liquor?

A. Well, I was shipping these horses to Jaurez. If either one of those boys had been drunk I would not have sent them with the horses.

Defendant objects; and moves the court to exclude the answer from the consideration of the jury.

The COURT: Let it be stricken from your consideration, gentlemen of the jury.

6 Q. Well, was either one of them drunk or drinking?
A. They were not drunk.
7 Q. Were they, so far as you could see, at all under the influence of liquor?
A. No, sir.

501 Fayette Circuit Court.

CATESBY WOODFORD and JOHN T. IRELAND, Plaintiffs,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.

Stenographer's Certificate.

I, Mary A. Chiles, Official Stenographer of the Fayette Circuit Court, do hereby certify that the foregoing four hundred and Ninety Seven (497) pages contain a full and accurate transcript of the shorthand notes of the oral evidence, and exhibits filed, in the above styled cause.

Given under my hand, this 19th day of July, 1912.

MARY A. CHILES,
Official Stenographer, Fayette Circuit Court.

Examined, approved and certified to be correct, this 19th day of June, 1912.

CHAS. KERR, *Judge.*

O. K.
TALBOTT, *Att'y.*

502 At the same time and with the foregoing transcript, the appellant filed the following statement of appeal, to-wit:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Statement.

1. The name of the appellant in this action is Louisville & Nashville Railroad Company.
2. The names of the appellees are Catesby Woodford and John T. Ireland.

3. The judgment appealed from was rendered on the twenty-second day of December, 1911, and may be found on page 20 of the record.

4. The appeal was granted by the court below, and no warning order or summons is desired.

5. The attorneys for the appellees are Robert B. Franklin, of Frankfort, Kentucky, and Robert C. Talbott, of Lexington, Kentucky.

R. A. THORNTON,
B. D. WARFIELD,
CHAS. H. MOORMAN,
Attorneys for Appellant.

503 At a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in Frankfort on the 25th of September, 1912, the following order was entered, to-wit:

LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
WOODFORD, &C.

Fayette.

Came the parties by counsel and filed an agreement and on their motion and by consent appellees are given to September 25th and appellant 12 days thereafter to file briefs.

Afterwards at a Court of Appeals held as aforesaid on the 8th day of October, 1912, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
WOODFORD, &C.

Fayette.

Came the parties by counsel and filed an agreement and on motion and by consent appellant is given to October 20th to file a reply brief herein.

Afterwards at a Court of Appeals held as aforesaid on the 17th day of October, 1912, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
WOODFORD, &C.

Fayette.

Came the parties by counsel and filed an agreement and on their motion and by consent this case is now submitted.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid on the 28th day of January, 1913, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
Woodford, &c.

Fayette.

Came the appellant by counsel and tendered a supplemental brief herein with notice and moved the court to file same, which motion is submitted.

504 Afterwards at a Court of Appeals held as aforesaid on the 29th of January, 1913, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
Woodford, &c.

Fayette.

Came the appellees by counsel and objected to the filing of the supplemental brief of appellant and the court being sufficiently advised said supplemental brief is ordered filed, to which the appellees object and leave is given them to file brief on the objection and also to reply to the supplemental brief in ten days.

The following is a copy of the supplemental brief of appellant filed by the foregoing order.

505 Court of Appeals of Kentucky.

Louisville & Nashville Railroad Company, Appellant,
versus
Catesby Woodford and John T. Ireland, Appellees.

Supplemental Brief for Appellant.

May it please the Court:

Since the original brief for the appellant was filed in this case, the Supreme Court of the United States has decided three cases which, we think, affect a very material point in the case at bar, and to which we desire to direct the court's attention. Those opinions were delivered January 6, 1913, and they are appended to this brief. (Adams Express Co. v. Croninger; Chicago, Burlington & Quincy R'y Co. v. Miller, and Chicago, St. Paul, Minneapolis & Omaha R'y Co. v. Latta.)

The contract under which the shipment of horses involved in this case was made is a part of the record. It was filed in the case (Vol. 1, Tr. 289) and was introduced in evidence (Vol. 2, Tr.

179). It was procured by the plaintiff Ireland (Vol. 1, Tr.
506 37). The contract was made at Lexington, Kentucky, for the transportation of the horses to Juarez, Mexico. It provides—

"That the carrier will carry live stock at the rates established by it therefore, or, where certain risks, duties, and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates.

"In the present instance the shipper elects to avail himself of the said reduced rate, and has delivered on the cars of the carrier the following described live stock, to-wit:"

The reduced rate for the shipment in question was $323.30, and one of the risks and liabilities assumed by the shippers, as provided in the contract, was that "should damage occur for which the said carrier may be liable, the value at the place and date of the shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack $150; for a horse or mule $100, each, etc., * * * ; which amounts it is agreed are as much as such animals as are herein agreed to be transported are reasonably worth."

If these provisions in the bill of lading are valid and obligatory on the appellees, then, the greatest amount that the appellees can recover in this action is $100 for each horse that was damaged.

Previously to the decision of the case of Adams Express Company v. Croniger, supra, it was held in this State that the limited-valuation clauses in contracts of shipment were invalid, and that the shipper was entitled to recover the actual value unless sufficient facts were shown, independently of the special contract, to
507 avoid the contract for fraud or to create an estoppel at common law. (Adams Express Co. v. Walker, 119 Ky. 121; Southern Express Company v. Fox & Logan, 131 Ky. 257.) Nor had it ever been held that the State was without power and authority to promulgate and enforce such a regulation as affecting interstate shipments. On the contrary, in the case of Pennsylvania Railroad Co. v. Hughes, 191 U. S. 447, where there was involved a bill of lading in all essentials identical with the bill of lading in the case at bar, whereby it was stipulated that in consideration of a reduced rate of freight, the shipper should receive, in case of negligent loss, the agreed value declared in the receipt, it was held by the Supreme Court that the policy of the State declaring void such a stipulation in the bill of lading of an interstate shipment was not an interference with the regulation of commerce among the States by Congress, inasmuch as Congress had not legislated upon that particular subject, and that, therefore, the decision of the Supreme Court of Pennsylvania, declaring the limitation invalid as forbidden by the public policy of that State, was final as affecting such questions arising in that State. However, in the Adams Express Co. case, supra, the Supreme Court, after referring to the extensive amendment, by the Act of Congress of June 29, 1906, to the Interstate Commerce law, and particularly to Section 20 of the amendment, generally referred to as the "Carmack Amendment," holds that the legislation in question supersedes all the regulations and policies by

a particular State upon the subject sought to be embraced in
508 the amendment, and that said amendment embraces the subject of the liability of the carrier under a bill of lading for an interstate shipment. It is said that, under said amendment, the duty to issue a bill of lading and the liability thereby assumed are covered in full, and that though there is no reference to the effect upon State regulations, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.

One of the significant and dominating features of the amendment, as pointed out in the opinion, is that "it affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives 'property for transportation from a point in one State to a point in another.' "

The presumption in all cases, nothing to the contrary appearing, is that the bill of lading issued by a carrier was issued pursuant to the requirement of the amendment and in conformity to the law. Accordingly, as the bill of lading issued in the case at bar recites that the carrier will carry live stock at the rates established by it therefor, or, where certain risks, duties, and liabilities are assumed by the shipper, will carry such stock at greatly reduced rates, and that in the present instance the shipper elects to avail himself of said reduced rates, it must be presumed that the rate for carrying horses of the value of more than $100, where the liability in case of loss was not limited to that amount, was a higher rate, which
it was not only the duty of the carrier to impose and col-
509 lect, but was unlawful for the carrier not to impose and collect.

In the Adams Express Company case, it was held that it was not vital to the fairness of the agreement that no inquiry was made as to the actual value, that "the receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." While it is said that that presumption was strengthened by the fact that across the bill of lading there was written, "This Company's charge is based upon the value of the property, which must be declared by the shipper," we do not think such a writing across the bill of lading was necessary, as it must be presumed that the schedules of rates and regulations of the appellant for the transportation of horses from Lexington, Kentucky, to Juarez, Mexico, were on file with the Interstate Commerce Commission, as required by law, and were posted, as required by law, and that the shippers had knowledge thereof. But, even if the rate was not posted, the result is the same. I. C. R. Co. v. Henderson Elevator Co., decided January 6, 1913, by the United States Supreme Court, and which opinion is also appended at the back of this brief.

Section 6 of the Act of June 29, 1906, amendatory of the Act to Regulate Commerce, provides for the publication of rates and for

the posting of same; and Section 10 of said Act prohibits
510 any person from granting or procuring a lower rate by means of false billing, classification, or any other device. Hence, we contend that it must be presumed that the shippers knew that there was a higher rate for the transportation of such horses if there was no agreement limiting the recovery in the event of damage or loss, and that it must also be presumed that there was no intention on the part of either the shippers or the carrier to violate the law with respect to the transportation of the horses on a lower rate than the legal rate, but that it was understood between them that the shipment was to be made at the rate stipulated in the bill of lading, which was based on the valuation fixed in the bill of lading, which limited valuation, under the cases hereinbefore referred to, is binding on the shippers and the carrier.

Under the authorities referred to, we submit that a verdict for a larger amount than $100 for each horse that was lost or damaged is in violation of the Act to Regulate Commerce, as amended June 29, 1906, and that the judgment for damages, to that extent, is an interference with the power and authority exercised by Congress in the regulation of commerce among the States, and should be reversed.

Respectfully submitted,

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Attorneys for Appellant.

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Of Counsel.

511 *Appendix.*

Supreme Court of the United States, October Term, 1912.

No. 18.

ADAMS EXPRESS COMPANY, Plaintiff in Error,
vs.
E. H. CRONINGER.

In error to the Circuit Court of Kenton County, State of Kentucky.

[January 6, 1913.]

This was an action in the Circuit Court of Kenton County, Kentucky, against the Express Company to recover the full market value of a small package containing a diamond ring which was delivered by the plaintiff below to the Express Company at its office in Cincinnati, Ohio, consigned to J. W. Clendenning at Augusta, Georgia. The package was never delivered.

The Express Company made defense by answer. The plaintiff demurred to the answer as not containing a defense, which demurrer was sustained. The company declined to further plead, whereupon

the Circuit Court gave judgment for the sum of $137.52, being the full value of the ring and interest. A writ of error was sued out from this court to the Circuit Court of Kenton County, that being the highest court of the State in which a decision could be
512 had.

The answer and accompanying exhibit were in substance as follows:

That the defendant was an express company engaged in interstate commerce within the provisions of the act of Congress of June 29, 1906; that in obedience to that act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia, which schedules showed that its rates and charges, when the value of the property to be carried was in excess of fifty dollars, were graduated reasonably, according to the value, and that the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars.

It is averred that the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment, and that it (the defendant) required that the value should be declared by the shipper, and that if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of fifty dollars. It is then alleged that the package so delivered was sealed and that defendant did not know the contents or value, and that if it had it would not have received it for carriage for less than the lawful published rate of fifty-five cents. The receipt or bill of lading issued shows no value, but contains a stipulation in these words:

513 "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

Mr. Justice LURTON, after making the foregoing statement, delivered the opinion of the Court:

The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this Court jurisdiction.

Under the law of Kentucky this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, "unless," as said in Adams Express Company v. Walker, 119 Kentucky, 121, and affirmed in

Southern Express Company v. Fox and Logan, 131 Kentucky, 257, "sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law."

The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local
514 law of the State, or by the acts of Congress regulating interstate commerce.

That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority.

But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and non-feasance committed within its limits, although interstate commerce may be indirectly affected: Smith v. Alabama, 124 U. S. 465; New York, etc., Railroad v. New York, 165 U. S. 628; Chicago & Milwaukee R'y v. Solan, 169 U. S. 133, 137; Richmond, etc., R'y v. Patterson Co., 169 U. S. 311; Cleveland, etc., R'y v. Illinois, 177 U. S. 514; Pennsylvania Railroad v. Hughes, 191 U. S. 477. In the Solan case, cited above, it was said of such State legislation:

"They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the
515 liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

In that case the court upheld the validity of an Iowa Statute which made void every "contract, receipt, rule or regulation, which shall exempt any railway from liability as a common carrier, which would exist had no contract, receipt, rule, or regulation been made or entered into."

The contract there involved was for transportation of cattle with a drover in charge, and the shipper had signed a contract limiting the liability to himself or the drover to $500 for injury to the person of the drover. Proof was offered that this limitation was the consideration for a reduced rate of transportation.

In Pennsylvania Railroad v. Hughes, 191 U. S. 477, 489, 491, there was involved a bill of lading in all essentials identical with the one here concerned, whereby it was stipulated that in consideration

of a reduced rate of freight, the shipper should receive, in case of negligent loss, the agreed value declared in the receipt. The shipment was made in New York, where the stipulation was valid, to a point in Pennsylvania, where such a limitation was invalid. The loss occurred in the latter State, and the Supreme Court of the State upheld a judgment for the full value, declaring the limitation invalid as forbidden by the public policy of that State. That
516 case came to this Court upon the contention that the Pennsylvania court in refusing to limit the recovery to the valuation agreed upon had denied to the railroad company a right or privilege secured to it by the Interstate Commerce Law. But this court as to that said:

"It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this Court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error, 24 Stat. at L., 379, 382; 25 U. S. Stat. at L., 855, provide for equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the Commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the Commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose without in-
517 tention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

"While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on inter-state lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

In view of the decisions of this Court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular States.

The original Interstate Commerce Act of February 4, 1887, was extensively amended by the Act of June 29, 1906, 34 Statutes at Large 584. We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in the 20th section, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as
518 the Carmack amendment. For convenience of reference, it is set out in the margin.*

This amendment came under consideration in Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, but the opinion and judgment was confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

The significant and dominating features of that amendment are these:

First. It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one State to a point in another."

Second. Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it."

Third. It is also made liable for any loss, damage, or injury to such property caused by "any common carrier, railroad or transpor-

*That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section, shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose lines the loss, damage or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

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tation company to which such property may be delivered or over whose line or lines such property may pass."

519 Fourth. It affirmatively declares that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and State courts, was either that of the general common law as declared by this Court and enforced in the Federal courts throughout the United States, Hart v. Railroad, 112 U. S. 331; or that determined by the supposed public policy of a particular State, Pennsylvania Railroad v. Hughes, 191 U. S. 377; or that prescribed by statute law of a particular State, Chicago, etc. Railroad v. Solan, 169 U. S. 133.

Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in Southern Pacific Railway Co. v. Crenshaw, 63 S. E. 865, where the court said:

"Some States allowed carriers to exempt themselves from all or a part of the common law liability by rule, regulation, or contract, others did not. The Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judical holding that it was practically impossible for a shipper engaged in business that extended beyond the confines of his own State or a carrier whose

520 lines were extensive to know without considerable investigation and trouble, and even then oftentimes with but little certainty what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity, for the national law is paramount and supersedes all State laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated and not impaired or destroyed by the State courts' obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorizes the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. Northern Pacific R'y v. State of Washington, 222 U. S. 370; Southern Railway v. Reid,

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222 U. S. 424; Mondou v. Railroad, 223 U. S. 1; Michigan Central Railroad v. Vreeland, just decided.

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy
521 will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.

What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common law duty as a common carrier.

But it has been argued that the non exclusive character of this regulation is manifested by the proviso of the section, and
522 that State legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing State law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

What this Court said of the 22nd section of this act of 1906 in the case of Abilene Cotton Mills v. Texas & Pac. R'y, 204 U. S. 426, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this Court said of that contention what must be said of the proviso in the 20th section, that it was "evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by State statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act." Again, it was said, of the same clause, in the same case, that it could "not in reason be construed as continuing in a shipper a common law right the existence of which would

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be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights
523 and remedies under existing State laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.

We come now to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of fifty dollars, as shown therein. This limiting clause is in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations; and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of fifty dollars, was twenty-five cents, while for the same package if its value had been declared to be one hundred and twenty-five dollars, the amount for which the plaintiff sues as the actual value, the lawful charge ac-
524 cording to the rate filed and published would have been fifty-five cents. It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type, "This Company's charge is based upon the value of the property, which must be declared by the shipper."

That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. York Co. v. Central Railroad, 3 Wallace, 107; Railroad Company v. Lock-

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wood, 17 Wallace 357; Bank of Kentucky v. Adams Express Company, 93 U. S. 174; Hart v. Pennsylvania Railroad, 112 U. S. 331, 338. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agree-
525 ment with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk. York Co. v. Railroad, 3 Wallace 107; Railroad v. Lockwood, 17 Wallace 357; Hart v. Pennsylvania Railroad, cited above; Phœnix Ins. Co. v. Erie Trans. Co., 117 U. S. 312, 322; Steam Co. v. Phœnix Ins. Co., 129 U. S. 307, 442; New York, etc., R'y v. Estill, 147 U. S. 591, 619; Primrose v. W. U. Tel. Co., 154 U. S. 1, 15; Chicago, etc., R'y v. Solan, 169 U. S. 133, 135; Calderon v. Steamship Company, 170 U. S. 272, 278; Hughes v. Pennsylvania Railroad, 191 U. S. 477, 485.

That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree
526 measured by the bulk, weight, character and value of the property carried.

Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in Hart v. Pennsylvania Railroad, cited above, where it is said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for

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negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this Court as well as many
527 courts of the States. Greenwald v. Barrett, 199 N. Y. 170, 175; Bernard v. Adams Express Co., 205 Mass. 254, 259. The exemption forbidden is, as stated in the case last cited, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this Court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld, the Court saying:

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes."

In Greenwald v. Barrett, cited above, the same conclusion was reached as to the nature of the liability imposed and the purport of the exemption forbidden, the Court, among other things, saying:

528 "The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges dependent upon the value of the goods or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of the property were distinctly upheld by the Supreme Court of the United States in Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 341."

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To the same effect are the cases of Travis v. Wells, Fargo Co., 79 N. J. 83; Fielder v. Adams Express Co., (S. C. W. Va.) 71 S. E. 99. Larsen v. Oregon Short Line, (S. C. Utah) 110 Pac. Rep., 983. See also Transfer Co. v. Atchison, 76 N. J. L. 608, as to the general rule.

That a carrier rate may be graduated by value and that a stipulation limiting recovery to an agreed value made to adjust the rate is recognized by the Interstate Commerce Commission, see 13 I. C. C. Rep. 550.

We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.

The demurrer to the answer of the defendant below should have been overruled. For this reason the judgment is reversed, with direction to overrule the demurrer, and for such further proceedings as are not inconsistent with this opinion.

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Test:

Clerk Supreme Court, U. S.

529 Supreme Court of the United States, October Term, 1912.

No. 17.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Plaintiff in Error,

vs.

H. FRED MILLER.

[January 6, 1913.]

In Error to the Supreme Court of the State of Nebraska.

Mr. Justice LURTON delivered the opinion of the Court:

The question in this case, as in Adams Express Company v. Croninger, just decided, is whether the provisions of Section 20 of the act of February 4, 1887, as amended by the act of June 29, 1906, 34 Statutes at Large, 584, constitute an exclusive regulation of contracts for interstate shipments of property by railroad common carriers, superseding all State regulations upon the same subject.

The action in this case was to recover the full value of a stallion shipped from a point in Iowa to a point in Nebraska, under a valued live stock contract. The loss occurred in the State of Nebraska through the negligence of the carrier, and the suit was in a court of that State.

The receipt or bill of lading placed a value upon the animal of two hundred dollars, and was signed by the shipper's agent. It recited that the schedules of rates and regulations filed with the

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Interstate Commerce Commission provide alternative rates
530 of charges proportioned to the value of the stock delivered for transportation, as declared by the shipper, and that the recovery of the shipper in case of loss or injury should not be in excess of the value thus agreed upon for the purpose of determining the rate.

The plaintiff's claim is that the stallion was in fact of the value of two thousand dollars, and that the limitation of recovery stipulated is void under a statute of Iowa, where the contract was made, and also illegal and invalid under a clause in the constitution of Nebraska, the State in which the loss occurred and of the forum.

The Company relies upon the provisions of the act of 1906 as an exclusive rule regulating every contract for an interstate shipment and declaring the liability of the carrier, and contends that the regulations provided by the 20th section of that act operate to supersede the legislation of both Iowa and Nebraska, in so far as they applied to interstate shipments.

This defense was overruled in the trial court, and the agreement in the plaintiff's bill of lading limiting any recovery in case of loss or damage to the value declared for the purpose of obtaining the lower or alternative rate of freight, was held to be illegal both under the law of Iowa and Nebraska, and judgment was rendered for the full value of the animal. This judgment was affirmed by the Supreme Court of Nebraska, that court ruling that the case was controlled by the State regulations referred to, and that these regulations had not been superseded by acts of Congress regulating interstate commerce. For this the court cited and relied upon
531 certain decisions by the Nebraska courts, and the cases of Railroad v. Solan, 169 U. S. 133, and Pennsylvania Railroad v. Hughes, 191 U. S. 477. Both of the cases decided by this Court were decided prior to the extensive amendment of the act regulating interstate commerce of 1887 by the act of June 29, 1906.

In Adams Express Company v. Croninger, just decided, we reached the conclusion that by the provisions of the 20th section of the latter act Congress had manifested a purpose to take possession of the subject of the liability of a carrier by railroad for interstate shipments, and that the regulations therein had superseded all State regulations upon the same subject. This case is therefore controlled by that judgment.

It follows that the Supreme Court of Nebraska erred in applying to the contract here involved the provisions of the Iowa statute, and of the constitution of the State of Nebraska, and in refusing to apply the exclusive regulation prescribed by the 20th section of the act of 1906, as that provision has been construed by this Court in the Croninger case, above referred to.

The judgment is accordingly reversed and remanded for further proceedings not inconsistent with this opinion.

True copy.

Test:

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Clerk Supreme Court, U. S.

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532 Supreme Court of the United States, October Term, 1912.

No. 231.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY CO., Petitioner,
vs.
BUD R. LATTA.

[January 6, 1913.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Justice LURTON delivered the opinion of the Court:

This was an action to recover the full value of two horses lost in the course of interstate transportation.

The defense in substance was that the plaintiff had declared the value of each of the animals to not exceed one hundred dollars, and had signed a shipping contract wherein he agreed that that was the value and that the company's liability in case of loss or damage should not exceed the agreed value. It was also shown that the schedule of tariff rates was based upon values and that a higher rate was allowable if a higher value had been declared. It was claimed that a limitation of liability made for the purpose of obtaining the lower of alternative rates was admissible under the provisions of the 20th section of the Interstate Commerce Act of June 29, 1906, 34 Statutes at Large, 584.

The Circuit Court instructed a verdict for the agreed value,
533 ruling that the contract was calid and was controlled by the Interstate Commerce Acts. The Circuit Court of Appeals reversed this judgment, upon the ground that the contract was invalid under the Constitution of the State of Nebraska, and held the plaintiff entitled to recover the full value of the animals. 172 Federal, 850. The case was remanded to the Circuit Court, where, in pursuance of the judgment and opinion of the Circuit Court of Appeals, the jury was instructed that it should find the actual value of the animals lost and return a verdict for that amount. Upon a second writ of error this judgment was affirmed by the Circuit Court of Appeals, and the cause has come to this court upon a writ of certiorari.

The case is governed by the case of Adams Express Company v. Croninger, and C. B. & Q. R'y v. Miller, both just decided.

Judgment reversed and the case is remanded for a new trial.

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534 Supreme Court of the United States, October Term, 1912.

No. 105.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, Plaintiff in Error,
vs.
HENDERSON ELEVATOR COMPANY.

In Error to the Court of Appeals of the State of Kentucky.

[January 6, 1913.]

Memorandum opinion, by direction of the Court, by Mr. Chief Justice WHITE:

The Henderson Elevator Company, defendant in error, as plaintiff below brought this action to recover damages from the Railroad Company, the plaintiff in error, because of a loss alleged to have been sustained by an erroneous quotation by the agent of the Railroad Company of the freight rate on corn shipped in interstate commerce from the station of the Railroad Company at Henderson, Kentucky. A rate of 10 cents per hundred pounds was quoted by the agent when in fact the rate as fixed by the published tariff on file with the Interstate Commerce Commission and effective at the time was 13½ cents per one hundred pounds. On the trial before a jury the court instructed that if the loss sustained by the plaintiff "was occasioned and brought about by defendant's failure to have posted or
535 on file in its office in Henderson, Kentucky, its freight tariff rate in question and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question, of which plaintiff complains, * * *" there should be a verdict for the plaintiff. A verdict having been rendered for the plaintiff in accordance with this instruction and the judgment entered thereon having been subsequently affirmed by the Court of Appeals of Kentucky (138 Ky. 220), this writ of error was sued out.

It is to us clear that the action of the court below in affirming the judgment of the trial court and the reasons upon which that action was based were in conflict with the rulings of this Court interpreting and applying the act to regulate commerce. New York Cent. R. R. v. United States (No. 2), 212 U. S. 504; Texas & Pacific R. R. Co. v. Mugg, 202 U. S. 242; Gulf Railroad Co. v. Hefley, 158 U. S. 98. That the failure to post does not prevent the case from being controlled by the settled rule established by the cases referred to is now beyond question. Kansas City So. R'y Co. v. Albers Comm. Co., 223 U. S. 594 (*a*).

Reversed.

True copy.
Test:

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Clerk Supreme Court, U. S.

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536 Afterwards at a Court of Appeals held as aforesaid on the 6th day of February, 1913, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
Woodford, &c.

Fayette.

Came the appellees by counsel and filed a reply to the supplemental brief of appellant herein with notice.

The following is a copy of the reply filed by the appellees by the foregoing order:

537 Court of Appeals of Kentucky.

Louisville & Nashville Railroad Company, Appellant,
vs.
Catesby Woodford and John T. Ireland, Appellees.

Appellees' Response to Supplemental Brief for Appellant.

Appellant's Supplemental Brief is plainly a hopeless effort to grab at straws, indicating a signal lack of confidence in its appeal as already fully presented by briefs, because when we rightly understand this appeal, the recent decision by the Supreme Court of the United States, in Adams Express Company vs. Croninger, which is the occasion for filing Appellant's Supplemental Brief, has no bearing whatever upon any question involved in this appeal.

We do not know what other cases of this kind there may be pending in this Court, and it is possible that the state of the record in some of those cases may make the recent decision of the Supreme Court, in the case above referred to, more or less important.

However that may be, in this particular case at bar, and for the reasons which we will now proceed to assign, there is no ques-
538 tion in this case upon which the Supreme Court decision throws any light whatever.

The Supreme Court opinion in the above case of Adams Express Company vs. Croninger, decided January 6th, 1913, upon which Appellant relies, recites that the defendant, Adams Express Company, made defense, by answer, wherein it alleged:

First. "That the defendant was an express company engaged in interstate commerce within the provisions of the act of Congress of June 29th, 1906;

Second. "That in obedience to that act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia;

Third. "That its schedule showed that its rates and charges, when the value of the property to be carried was in excess of fifty dollars, was graduated reasonably, according to the value;

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Fourth. "That the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars;

Fifth. "That the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment;

Sixth. "That it (the defendant) required that the value should be declared by the shipper;

Seventh. "That if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of fifty dollars;

Eighth. "That the package so delivered was sealed;

Ninth. "That the defendant did not know the contents or value;

539 Tenth. "That if it had it would not have received it for carriage for less than the lawful published rate of fifty-five cents."

An examination of the case at bar will disclose that the defendant made no such allegations and made no such claims, and made no such defense. In fact, while the defendant filed its answer setting out fully its defense, it failed to attempt to make any such allegations, and failed to attempt to make any such defense.

So, counsel in their Supplemental Brief can go no further than to ask the court to presume—(and that word is used many times in the Supplemental Brief),—to presume that the defendant had some such defense.

We insist that no presumptions can be indulged that the Railroad had such a defense, because after answer and trial the allegations of the answer must determine whether the Railroad Company had such a defense, or can claim to have had such a defense.

However, it is not a question on this appeal what defense the Railroad Company had, but what defense the Railroad Company has presented of record on this appeal.

It ought to be enough for our present purpose to say the Railroad Company has no such defense involved in this appeal, and, as an examination of the answer in this case bears us out in our statement that on this appeal the Railroad Company has no such defense, that ought to be enough, so far as this particular case is concerned, to show that the decision of the Supreme Court cannot possibly affect the decision on this appeal.

540 But, we might go further, if it were necessary, and show that the Railroad Company never had such a defense. The facts are that the Appellee Ireland requested the Railroad Company to furnish a car to ship eight race horses from Lexington to the race track at Juarez, Mexico. He paid the freight on the car, $323.20, without having any talk or discussion with the agent about different rates or different rates based on different values, in fact without knowing there was any such thing as different rates on the same thing for different values of the same thing (if indeed there was in reality different rates for different values, between Lexington and Juarez,

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Mexico, on race horses, which we deny and which the record fails to show.) Appellee Ireland did not know any of the facts recited in the Supreme Court decision above referred to as the basis for such a defense, nor did the Railroad Company lack knowledge of the value of these race horses, but on the other hand they were billed out by the agent of the Railroad as "eight race horses, four attendants."

We need not stop to argue that this agent, living at Lexington, in the race horse center, knew that these eight race horses which were choice enough, good enough, valuable enough and fast enough to be shipped from Lexington, Kentucky, to the race course at Juarez, Mexico, were worth more than $100.00 each.

Until the contrary appears, every one must be assumed to know the things of general and common information, and it would certainly be impossible to find any person in Lexington old enough to be agent of a railroad company who would not know that these eight
race horses which were being sent at a heavy expense to the
541 race course at Juarez, Mexico, were worth more than $100.00
each. A person who had enough information and common sense to be railroad agent at a shipping point like Lexington would certainly be presumed to know that much.

With full knowledge of the valuable character of these horses, this agent without any explanation as to the difference in rates, if any, or that there were different rates, if any, billed these horses out as "race horses" and used one of the printed bills of lading, which Ireland did not read and which the agent did not explain to him, and the terms of which were not discussed in any way. The agent simply informed Ireland the amount the car would cost him and Ireland paid the amount without any consideration as to different rates depending upon different values and without the agent intimating that he was charging a rate that would, as now claimed, limit the recovery in case the horses were killed or injured. In fact nothing occurred (transcript, pages 36-37) that would afford the slightest evidence in favor of Appellant Railroad Company, even if it had interposed such a defense in its answer.

We quote the controlling thought in the Supreme Court decision:

"It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk."

Could it possibly be claimed that in this case there was "a
542 fair, open, just and reasonable agreement limiting the amount
recoverable by the shippers?" The agent of the Railroad Company in issuing the bill of lading for these horses, which he billed as race horses, evidently gave the printed contents of this bill of lading no more thought than did the shipper Ireland, who did not read it. It is easy to understand why neither the shipper Ireland nor the agent paid any attention to the printed bill limiting the value of every horse to $100.00 and why they did not discuss or undertake to enter into any agreement on that subject. Everybody then

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thought that such a stipulation in this State would be useless because then seemingly unenforceable. Why should they spend any time on or pay any attention to what both parties regarded a dead letter in all such printed bills of lading. Under these circumstances, how can this general printed form which did not (except as to the words inserted therein by the agent "eight race horses," "four attendants" "$323.20,") conform to anything that had been said or referred to in conversation between the shipper and agent, have any weight whatever in this case? Could even the Appellant claim that the printed clause (as to every horse being valued at $100.00) in the bill of lading so executed "was a fair, open, just and reasonable agreement to limit the amount recoverable by the shipper?"

Moreover the Appellant Railroad Company, upon the conclusion of the evidence on the trial of this case, moved the court to give instructions A-B-C½-D and E. Instruction D asked by Appellant Railroad Company, being as follows:

543 "If the jury find for the plaintiffs they will fix the damages in such sum as would represent the fair market value at Frankfort, Kentucky, of such of said horses as were killed, and in addition thereto such further sum as will compensate them for the difference, if any, between the value of such other of the horses in question as were injured, if any, just before they were injured, and their respective values after the extent of their respective injuries were reasonably ascertained."

It will thus be seen that Appellant not only did not interpose any such defense as suggested in the Supplemental Brief, but on the other hand, upon final trial of the issues herein moved the court to instruct the jury, in the event the jury should find for the plaintiffs, to fix the damages in such sum as would represent the fair market value of these horses.

If the Appellant Railroad Company had even suspected that it had such a defense as is now suggested, it certainly would have asked the trial court to limit the recovery to the price fixed by this bill of lading, $100.00. After hearing the long list of witnesses for plaintiff testify that the market value of these horses killed and injured, was not less than $25,000.00, and after offering no proof to the contrary, the Railroad Company certainly would not have moved the court to instruct the jury to find for the plaintiffs the fair, market value of the horses. We must remember that this is an Appellate Court; that Appellant cannot complain of anything except errors of the lower court excepted to at the time; that it must have presented to the lower court in its answer its defense, if it claimed to have one on this subject; that it must have called upon the lower court

544 before judgment to pass upon its alleged defense; that it must have excepted to an adverse ruling of the lower court rejecting its defense before it could be heard to complain in this Appellate Court with reference to this alleged defense.

The failure to make in its answer any such defense in this case, and in addition thereto the action of the Railroad Company in moving the trial court to instruct the jury to find for the plaintiffs the

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fair, market value of these horses, to our minds makes preposterous this after-thought to conjure up such a defense.

As it is well settled that a litigant cannot complain of an instruction given by a trial court where he himself has asked the same or in substance the same instruction, how is the Railroad Company to complain in this case of the finding of the jury based on an instruction given by the court to find the market value of the horses, instead of the nominal value fixed by the bill of lading, when Appellant Railroad Company itself asked such instruction?

How can it complain that the jury were allowed to exceed the nominal sum fixed in the printed bill of lading, $100.00, when the Appellant Railroad Company itself asked the court to disregard the nominal amount in the printed bill of lading and to give an instruction to the jury to find the full market value?

We repeat that there may be other cases pending in this court wherein this decision of the Supreme Court may be important, but in this particular case, where there is no evidence upon which to base such a contention; where there was no answer claiming any such a defense,—no such defense offered—no ruling on
545 & 546 such answer—no exception thereto,—where the instructions asked by the Appellant Railroad Company forever precludes the idea that there was or could be such a defense in this particular case, certainly the recent opinion of the Supreme Court can have no bearing on any question presented by this appeal.

Accordingly an affirmance is respectfully asked.

ROBT. B. FRANKLIN,
ROBT. C. TALBOTT,
Attorneys for Appellees.

547 Afterwards at a Court of Appeals held as aforesaid on the 14th day of February, 1913, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
WOODFORD, &C.

Fayette.

Came the appellant by counsel and filed a reply brief herein with notice.

The following is a copy of the reply brief filed by the foregoing order:

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548 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Appellant's Reply to Appellees' Brief.

Notwithstanding the charge of the distinguished counsel for appellees that our reliance in our supplemental brief in this case that certain decisions of the Supreme Court of the United States, rendered January 6, 1913, in which the amendment of June 29, 1906, to the original Interstate Commerce Act of February 4, 1887, uphold what is commonly known as the "agreed valuation" provision of carriers' contract for the transportation of stock, is a "preposterous afterthought to conjure up such a defense"; that it is absurd to think that those decisions can have any bearing upon or can be considered by this court in this case; and that counsel for appellant are not sincere in their attempted application of said decisions to the case now at bar, we shall not ourselves retaliate by applying disparaging epithets to the brief, or the sincerity of counsel, although we
549 must confess that it is difficult to reconcile their attempt personally to testify for Mr. Ireland in their response brief, by going outside of the record to state that when he signed the contract which is the foundation of this action, he had not read it and was ignorant of its provisions, with our personal knowledge of the professional acquirements of counsel. Of course, such statements have no proper place in the brief.

We suppose counsel were emboldened to make these statements by the fact that we permitted to pass unnoticed their act in attaching to and making part of their original brief a newspaper clipping of a sale of colts, which occurred months after the trial of the case. Can it be that "custom hath made it in them a property of easiness," to indulge in such practice?

The response brief seems to attempt to establish two points: first, that if we had specially pleaded as a defense the agreed valuation provision of the contract in question, then the plaintiffs would have proved by Mr. Ireland that when he signed and delivered the contract, he did not read it and was ignorant of its provisions, and therefore was not bound by it; second, that as the federal question now relied upon by appellant was not specially pleaded, and relied upon in the trial court, the defendant is now estopped from raising that question in this court.

While we are ourselves conscious that the first proposition has no proper place in appellee's response brief, nevertheless we accept the issue intended to be implied from the first proposition, and we deny that either of the two said propositions is correct or sound in principle.

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550 I.

One who signs a written instrument, without being induced thereto through fraud or deception, can not avoid its effect on the ground that at the time he signed he did not read it or know its contents. He will be bound by the conditions expressed in the contract, whether he did or did not read them or know what they were; and in the absence of evidence showing fraud or mistake no evidence can be introduced to show an understanding different from that which the law would imply from the instrument itself.

We here copy so much of the contract in question in this case as is pertinent to be considered in this discussion.

"Louisville & Nashville Railroad Company's Contract for the Transportation of Live Stock Over its Own Lines.

"LEX., KY.—STATION—11/17, 1910.

"This contract entered into at the above time and place between the Louisville & Nashville Railroad Company, hereinafter, called the carrier, and —— hereinafter called the shipper,

"Witnesses, That the carrier will carry live stock at the rates established by it therefor, or, where certain risks, duties, and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates.

"In the present instance the shipper elects to avail himself of the said reduced rate, and has delivered on the cars of the carrier the following described live stock, to-wit:

551

Consignee.	Destination, etc.	Description of stock.	Car number.
J. T. Ireland,	Juarez, Mex.	8 race horses. 4 attendants.	A. P. H. 5011.

Charges, $62.96 Rent.
2.00 Bed.
1.00.

"The carrier agrees to transport said live stock to destination if on said carrier's line of railroad, otherwise to the place where said live stock is to be received by the next connecting carrier for transportation to or towards destination, and the carrier guarantees that the freight rate thereon from point of shipment to destination shall not exceed the reduced rate of $323.20 per —.

"In consideration of all of which the shipper hereby agrees to assume the risks, duties, and liabilities hereinafter specified, and that the transportation shall be upon the following conditions, which are admitted and accepted by said shipper as just and reasonable, viz:

——.

"9. Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack $150; for a horse or mule $100; mare and colt together $100;

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yearling colt $50; cow and calf together $35; domestic horned animals $30 each; yearling cattle, each $15; calves, hogs, sheep, or goats, $5 each; chickens, ducks, and guinea fowls $2.50 per dozen; geese $3.50 per dozen, and turkeys $5.00 per dozen; which amounts it is agreed are as much as such animals as are herein agreed to be transported are reasonably worth."

552 Across the face of the contract in red ink, in capital letters are stamped the following words, viz.:

"The attention of shippers has been called to the terms, conditions, value, etc., herein named."

As it is admitted by counsel that the words and figures "8 race horses," 4 attendants," "$323.20" were inserted in the contract for the transportation of the stock in conformity with something which occurred in conversation between Ireland and the agent; hence, as the agent derived his information from Ireland that the horses were "race horses," and billed them accordingly, we fail to appreciate the force of the criticism of counsel upon the fact that the horses were so billed.

It is admitted by counsel in their response brief that Ireland did not read the contract when he signed it, and that he gave little or no thought to it.

In the case of Boylan v. Hot Springs R. Co., 132 U. S. 150, speaking through Mr. Justice Gray, that court said:

"This is an action of assumpsit, and can not be maintained without proof of a breach of contract by the defendant to carry the plaintiff. The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were."

553 Within the last two years this court has rendered a series of cases upholding the principle there decided.

Speaking through Hobson, Chief Justice, in J. I. Case Threshing Machine Co. v. Mattingly, 142 Ky. 581 (March 7, 1911), it was said:

"He who signs a written contract without reading it takes the risk. He can not say he was imposed upon when he refused to read it, or hear it read. It was natural that Carter should say that his machine was a good one, and would do good work. When agents cease to puff their wares, they will cease to be employed. Mattingly was bound to know when the writing was drawn and signed that it was made for the purpose of evidencing the contract. In Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, the rule on the subject is stated by the United States Supreme Court as follows: 'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and if he will not read what he signs, he alone is responsible

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for his omission.' See, also, 9 Cyc. 388, and cases cited. A different rule prevails where the party is misled as to the nature of the writing, and is not himself negligent. Western Mfg. Co. v. Cotton, 126 Ky. 749, 104 S. W. 758, 31 Ky. Law. Rep. 1130, 12 L. R. A. (n. s.) 427. In 1 Greenleaf on Evidence, Sec. 275, it is said: 'When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner
554 of their undertaking, was reduced to writing, and all oral testimony of a previous colloquium between the parties or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected.' "

In Blake v. Black Bear Coal Co., 145 Ky. 403 (Dec. 13, 1911), speaking through Mr. Commissioner Clay, it said:

"Here, then, we have a case where a party, who seeks to avoid the consequences of a contract on the ground of mistake, admits that he read another contract, the obligations of which he assumed in the contract in question, but failed, through carelessness, to notice one of its important provisions. Besides this, the overwhelming weight of evidence is to the effect that the Boreing-Melcon lease, as well as the railroad contract, were before the parties at the time of the execution of the lease between appellant and appellee. As he, in the lease in question, assumed the provisions of each one of these contracts, it was incumbent upon him to know their provisions. As was said in the case of Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203, and cited with approval by this court in J. I. Case Threshing Machine Co. v. Mattingly, 142 Ky. 581, 134 S. W. 1131: 'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and if he will not read what he signs, he alone is responsible for his omission.' "

555 Again, speaking through the same learned judge in J. M. Case Mill Mfg. Co. v. Vickers, 147 Ky. (Mch. 6, 1912), it is said:

"Then, too, this is not a case where any confidential relation existed between the agent and purchaser, or where the purchaser could not read and write, or had to depend upon the agent. It is a case where an intelligent business man, who signed the contracts in duplicate and who had them before him, claims not have read them. In the recent case of J. I. Case Threshing Machine Company v. Mattingly, 142 Ky. 581, 134 S. W. 1131, this court said: 'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such

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is not the law. A contractor must stand by the words of his contract, and if he will not read what he signs, he alone is responsible for his omission. A different rule prevails where the party is misled as to the nature of the writing and is not himself negligent.' See also the case of Blake v. Black Bear Coal Co., 145 Ky. 788, 141 S. W. 403."

In Huber Mfg. Co. v. Piersall, 150 Ky. 307 (opinion by Winn, Justice), it is held that one who signs a written contract without reading it takes the risk, and will not thereafter be permitted to deny knowledge of its contents.

In Jones on Evidence, Section 25, Second Edition, the rule is stated thus:

556 "It is but the logical result of the rule under discussion that persons are presumed to know the legal effect of instruments which they have signed and, in the absence of evidence showing fraud or mistake, this presumption becomes so far conclusive that no evidence can be introduced to show an understanding different from that which the law would imply from the instrument itself, and the contract should be interpreted as the parties must be supposed to have understood its terms at the time."

Of course, it is elementary that when there is no imperfection or ambiguity in the language of a contract in writing, it will be deemed to express the entire and exact meaning of the parties.

It will be observed that in the contract under consideration it is expressly provided "that the carrier will carry live stock at the rates established by it therefor, or where certain risk, duties, and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates." It will be further observed that, by said contract "the shipper elects to avail himself of the said reduced rate." It will also be observed that the said contract is expressly made "in consideration" of the specified conditions and provisions, among them the provision and condition as to the agreed valuation of the stock, set out in Clause 9 of the contract.

Here, then, we have distinct notice given by the carrier to the shipper that the carrier has "established" rates for the transportation of live stock. Those rates can be established only in the

557 manner provided by the law, that is, by schedules posted as required by the law, which provision of the law was made for the benefit of the shippers, and he, as well as the carrier, is required by the law to take notice of and be bound by those rates. Not only does the contract give notice to the shipper that the carrier has established rates for the transportation of live stock, but that there is a difference in those rates, and that "reduced" rates will be given to the shipper upon the conditions specified in the contract itself. Not only so, but in order to guard, as far as possible, against the very contingency which has arisen in this case—the attempted repudiation of the contract by the shipper upon the alleged ground of ignorance of its provisions there was stamped in capital letters, in red ink, across the face of the contract, just above the signature of the shipper, the words "The attention of the shipper has been called to the Terms, Conditions, Value, etc., herein named."

The only object of that endorsement was to attract the attention

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of the shipper to those terms and conditions, and none but the most negligent could have failed to see them before he affixed his signature to the contract.

As we have shown, plaintiffs could not have availed themselves of their alleged ignorance upon the trial of the case, so that they have lost nothing by the point not having been made in the court below.

II.

It is not required by the Federal statute, Section 709 of the
558 Revised Statutes of the United States, nor by the rules of practice in the Supreme Court of the United States, nor by its decisions, that the federal question relied upon by a party should be either pleaded or relied upon in the trial court, unless such court be the highest court in the State having jurisdiction of the case in which the federal question is relied upon.

Section 709 of the Revised Statutes of the United States provides that a writ of error from the Supreme Court of the United States for the re-examination, reversal or affirmance of a judgment or decree of a State court must be from "the final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute, or an authority exercised under the United States, and the decision is against their validity"; and that such writ must be directed to such "highest court," from whose final judgment an appeal is to be taken by writ of error.

It is that statute which confers upon the Supreme Court jurisdiction to "re-examine, reverse, modify, or affirm, the judgment or decree of such State court."

Under that statue it is held by the Supreme Court of the United States that it is sufficient if the particular federal question relied on by a party to an action be especially claimed or asserted in some form in the "highest court" in the State having jurisdiction of the
559 case; and the form in which it is done is not essential, provided the attention of the court be sufficiently called to the federal question relied on by the party.

In Furman v. Nichols, 8 Wallace, 44, which was in error to the Supreme Court of Tennessee, it was insisted that the particular provision of the Constitution, which the plaintiffs in error complained had been violated in its application to their case, should be contained in the pleadings, and that it had not been so contained, and, therefore, that the federal question had not been properly presented.

Discussing that question, the court said:

"The main question involved in this suit is of more importance than difficulty, but before we proceed to discuss it, it is necessary to consider the point of jurisdiction which is raised by the defendant in error. The circumstances under which this court is authorized to review the decisions of State tribunals has been so often considered and decided that there is hardly anything left to do but to apply the already well-settled legal principles which govern this class of cases, to a particular record, in order to decide whether or not we

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have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through with the various adjudications of this court on this subject. It is enough for the purposes of this suit to say that a cause can be removed from a State court into this court under the twenty-fifth section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him, was denied to him by the State court. It is urged that the particular provision of the Constitution, which the plain-
560 tiffs in error say has been violated in its application to their case, should be contained in the pleadings but this is in no case necessary. If the record shows. either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question *was* in the case was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did."

In Oxley Stave Co. v. Butler County, 166 U. S. 648, which was in error to the Supreme Court of Missouri, the Supreme Court of the United States, in discussing the question as to whether the federal question was sufficiently raised to give the last-named court jurisdiction of the case, on page 653, said:

"Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any federal right. privilege or immunity was intended to be asserted. For aught that appears, the State court proceeded in its determination of the cause without any thought that it was expected to decide a federal question."

After discussing the question at length, the court said. in conclusion on page 660:

561 "If it appeared that the Supreme Court of the State regarded these general allegations as asserting such federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained. But it does not so appear."

The syllabus of the last-cited case is as follows, viz.:

"This court can not review the final judgment of the highest court of a State, even if it denied some title. right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the State court as belonging to such party under the Constitution or some treaty, statute. commission or authority of the United States, Rev. Stat., Sec. 709.

"The words 'specially set up or claimed' in that section imply that if a party in a suit in a State court intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he

must so declare; and unless he does so declare, 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the State court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference."

It will be seen from Oxley Stave Co v. Butler County that the meaning of the words "specially set up or claimed," in Section 709 aforesaid, are construed, and that the word "specially," as used in that section, simply means unmistakably.

The case of Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, went up to the Supreme Court of the United States on
562 a writ of error to review a judgment of the Supreme Court of Illinois, and one of the questions which arose and was considered by the Supreme Court was a question as to the jurisdiction of that court over the case.

The opinion of the court, which was delivered by Chief Justice Fuller, cited and approved the Oxley Stave Company case, and was, in part, as follows, viz:

"To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the State Court; the party must have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. Oxley Stave Company v. Butler County, 166 U. S. 648. 'In other words the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. * * * Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the State Court, which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment, or that such was its necessary effect in law. * * * It is not enough that there may be somewhere hidden in the record
a question which, if raised, would be of a Federal nature.
563 Hamilton Company v. Massachusetts, 6 Wall. 632. In order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether expressed or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United

States which had in some manner been brought to the attention of the court below.'"

The principle decided in the foregoing cases has been approved by the Supreme Court of the United States in a number of subsequent cases, and is now the settled law on the subject.

The Federal question involved in the pending case, which is claimed and asserted by appellant, is whether the operation and effect of the contract for a shipment of live stock from the State of Kentucky to a foreign country—the Republic of Mexico, as shown by the receipt or bill of lading, is governed by the local law of Kentucky, as held in Adams Express Company v. Walker, 119 Ky. 121, and affirmed in Southern Express Co. v. Fox & Logan, 131 Ky. 257, and subsequent cases, or by the acts of Congress regulating interstate commerce.

In the order overruling appellant's motion for a new trial, entered on the third day of February, 1912, the trial court expressly decided
564 that the contract of shipment under which the horses moved violated no right or immunity to which the appellant was entitled under the Commerce Clause of the Constitution of the United States or under any statute of the United States, including the Act of Congress entitled "An Act to Regulate Commerce," as amended by the Act of June 29, 1906, but that the said contract was in conformity to and permissible under the commerce clause of said constitution and said act. In so ruling, the trial court took cognizance of and passed upon the federal question in the case, thus holding inferentially, as the law is under the Croniger case, that the authority of the Congress of the United States over interstate transportation of freight, including contracts with reference thereto, is plenary and exclusive; but in rendering judgment in the case the court disregarded the appellant's rights under the Federal law, with respect to the extent of liability for loss or damage, and applied the law of Kentucky, the necessary effect of which judgment was, therefore, to deny to the appellant the rights that it was entitled to under the Federal Constitution and the aforesaid Act of Congress referred to in the order denying the appellant a new trial.

It is respectfully contended that appellant is entitled to the benefit of Clause 9 of the contract of shipment, and we ask the court so to hold.

Respectfully submitted,

R. A. THORNTON,
Counsel for Appellant.

C. H. MOORMAN,
B. D. WARFIELD,
Of Counsel.

565 Afterwards at a Court of Appeals held as aforesaid on February 18, 1913, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
WOODFORD, &C.

Fayette.

Came the appellees by counsel and moved the court for 10 days' time to file an answer to appellant's response brief herein, which motion is submitted.

Afterwards at a Court of Appeals held as aforesaid on the 21st day of February, 1913, the following orders and judgments were entered herein, to-wit:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
CATESBY WOODFORD, &C., Appellees.

Appeal from Fayette Circuit Court.

Came the appellees by counsel and tendered and moved the court to file their supplemental brief, to which appellant objects.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that appellees recover of appellant 10% damages on the amount of the judgment superseded herein. Which is ordered to be certified to said court.

It is further considered that appellees recover of appellant their cost herein expended.

At the same time, to-wit, on February 21, 1913, the Court of Appeals delivered an opinion herein in words and figures following, to-wit:

566 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Appeal from Fayette Circuit Court.

Opinion of the Court by Judge MILLER, Affirming:

On November 17, 1910, the appellant, the Louisville & Nashville Railroad Company received from the appellees, Catesby Woodford and John T. Ireland, seven thoroughbred horses, at Lexington, Kentucky, for shipment and transportation to Juarez, Mexico. The petition alleges that the plaintiffs, in order to afford the necessary light in the car which contained the horses, equipped said car with two suitable lanterns in the manner usual and customary in the shipment of horses over railroads, by hanging, swinging, wiring

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and anchoring said lanterns in said car securely and safely; that when the car reached appellant's freight yards at West Frankfort, Kentucky, about midnight, appellant's agents, employés and servants negligently and carelessly struck, crashed and jambed
567 the car containing said horses against its engine and other cars, with such force and violence, that it tore down one of said lanterns while lighted, and thereby set fire to the car and its contents, resulting in the death of three of said horses, and serious injury to the other four.

On January 6, 1911, the appellees filed this action against the appellant in the Fayette circuit court for damages, laying their loss at $25,225.00, for which they prayed judgment. The trial resulted in a verdict for the plaintiffs for $15,000.00, and from a judgment upon that verdict the defendant prosecutes this appeal. The company assigns three grounds for a reversal; (1) the damages are excessive; (2) the verdict is not supported by the evidence, which, it is claimed, shows no negligence upon the part of appellant's agents or servants; but, on the contrary, that the injuries were received by reason of the contributory negligence upon the part of appellees' servants; and, (3) the instructions given by the court do not embrace the full law of the case. As these are the only errors assigned in appellant's "Points and Authorities" to its original brief filed herein on August 31, 1912, the other errors alleged in the grounds for a new trial will be treated as having been abandoned. We will consider the questions raised in the order given.

1. The values fixed upon the horses by the plaintiff Woodford, are as follows:

568 Star Shoot colt out of Last Cherry	$7,500.
Star Shoot colt out of Blue Danube	7,500.
Miller filly out of Lady Beth	2,500.
Miller filly out of Lady Premier	1,500.
Ethelbert filly out of Miss Wicks	1,500.
Jack Point colt out of Lady Vincent	1,500.
Star Shoot colt out of Amy Davenport	4,000.

The appellees introduced eight witnesses as to the value of the Star Shoot colt out of Last Cherry, the average of their valuations being $7,468.75; eight witnesses as to the value of the Star Shoot colt out of Blue Danube, the average of their valuations being $7,687.50; five witnesses as to the value of the Miller filly out of Lady Beth, the average of their valuations being $1,800.00; four witnesses as to the injury to the Miller filly out of Lady Premier, the average loss being $937.50; five witnesses as to the injury to the Ethelbert filly out of Miss Wicks, the average estimated loss being $830.00; three witnesses as to the injury to the Jack Point colt out of Lady Vincent, the average loss being $758.33; and six witnesses as to the injury to the Star Shoot colt out of Amy Davenport, the average loss being $2,750.00. A recapitulation of the average values as given by those witnesses, shows the total valuation of the horses killed to be $16,956.25, and $5,275.83 loss on the horses that were

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injured, making a total loss upon the killed and injured of $22,232.08, when all the valuations are taken into consideration. Under the evidence there can be no doubt that these horses were as
569 finely bred as any race horses in America, and there can be no doubt that the witnesses who testified as to their value are all experts in their line and unexcelled as judges of horse values. The appellant introduced no witness upon the subject of values; but it insists that the fact, which it brought out on cross-examination, that at a public sale in New York in August 1910, two Star Shoot colts sold for $1,600.00 each, an Ethelbert filly sold for $100.00, and another Star Shoot colt sold for $600.00, show conclusively that the valuations given by appellees' witnesses are not only wholly speculative and unwarranted, but are contradicted by these actual sales. Appellees claim to have met this argument, however, by showing that at the time of this collision in November 1910, which was immediately after the gubernatorial election in New York, the price of race horses advanced materially by reason of the prospect of the speedy resumption of racing in New York; and that by August of that year, when the sales cited by appellant were made, there had been a slump in the horse market. Furthermore, appellant shows that Mr. Woodford had a sale upon his farm in 1911 of other colts of the same breed, and that at that sale they brought much lower prices than the values fixed by the witnesses in this case. The witnesses as to values gave their reasons at great length, and took into consideration every element that properly could be considered in fixing those values. It would be both unnecessary and un-
570 profitable to review those reasons at length, in the face of the well established rule in this State, that when evidence is contradictory this court will not disturb the finding of a jury upon the ground that the verdict is against the evidence, unless it be palpably and flagrantly so, or clearly shows that the jury were mistaken, or were influenced by passion, prejudice or corruption.

Cosky v. January, Hard., 549.
Hughes v. Brown, 1 A. K. M., 28.
Empire Coal & Mining Co. v. McIntosh, 82 Ky., 560.
L. & N. R. R. Co. v. Mitchell, 87 Ky., 327.
L. & N. R. R. Co., v. Ballard, 88 Ky., 159.
L. & N. R. R. Co., v. Cottongim, 119 S. W., 752.
Cox's Admr. v. L. & N. R. R. Co. 137 Ky., 397.
Louisville Ry. Co. v. Bryant, 142 Ky., 163.
Lexington Canning Co. v. Thomas, 21 Ky. L. R., 36. 50 S. W. 993.

As was said in L. & N. R. R. Co. v. Mitchell, 87 Ky., 337:

"The amount allowed seems large. It is so. The fact, however, that it appears high to us does not authorize a reversal. We are not acting as a jury, and it is only when it is glaringly excessive, and appears at first blush to have resulted from passion or prejudice, that we can interfere. The power should be sparingly exercised, and only in extreme cases. This is the policy of the law and reasonably and necessarily so."

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571 Under this thoroughly established rule, we do not feel at liberty to disturb the finding of the jury.

Furthermore, in view of the fact that the verdict is a compromise of the values as fixed by the witnesses upon that subject, it would seem that the evidence sustains the verdict, rather than discredits it.

2. There were two lanterns in the car, suspended from the ceiling, and wired to the sides. The purpose of these lanterns was to give light for the attendants in charge of the horses. Appellees show that these lanterns were placed in the car in the usual manner, and were securely wired so as to prevent accidents from the jarring of moving cars, while appellant insists that the lanterns were wired in such a way as not to make them safe. Upon this subject the evidence is contradictory; but as that question was fairly submitted to the jury as one of the elements they were to consider in finding their verdict, it will not be disturbed since there was evidence upon either side of the proposition.

The same may be said as to the counter-charge that Frakes and Moore, the two employees of the appellees who were accompanying the horses, were guilty of contributory negligence in bringing about the accident, by accidentally setting fire to the car while smoking. The testimony upon that subject was quite contradictory, there being testimony upon either side of the proposition, the weight of it, however, being with the appellees. In presenting the law of the case, the court gave the following instructions:

572 1. "If the jury believe from the evidence, that the plaintiffs, at the time, and on the occasion mentioned, shipped from Lexington, Kentucky, the head of horses in question, consigned to Jno. T. Ireland, Juarez, Mexico, by a contract of shipment previously made between the plaintiffs and defendant company, or its agents, or servants, or employés struck or bumped the defendant's line of railway, and while in charge of defendant for transportation, under said contract, the defendant railroad company, or its agents, or servants, or employes struck or bumped the car in which plaintiffs' horses were being hauled against its engine or other cars in a negligent manner, and that the said negligence, if any, on the part of the defendant caused one of the lanterns used by the plaintiffs or those in attendance, to set fire to the contents of said car, and to injure the plaintiffs' horses, or any of them, they should find for the plaintiffs, unless they should believe from the evidence, that the plaintiffs, or the attendants in charge of said horses, Chester Frakes and Horace Moore, or either of them, were guilty of negligence, as explained in Instruction No. 2."

1½. "Unless the jury believe from the evidence, that at the time and on the occasion mentioned, the defendant railroad company, or its agents, servants or employés, struck or bumped the car in which plaintiffs' horses were being hauled against its engine or other cars in a negligent manner, and that the said negligence, if any, on the part of the defendant caused one of the lanterns

573 used by the plaintiffs or those in attendance to set fire to the contents of said car, and to injure the plaintiffs' horses, or any of them, they should find for the defendant."

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2. "If the jury believe from the evidence, that Chester Frakes and Horace Moore, the attendants in charge of said horses, or either of them, were guilty of negligence while in charge of said horses, and that such negligence, if any, directly or proximately contributed to the injuries to said horses, or any of them, and that but for such negligence, if any, on the part of said persons, or either of them said horses would not have been injured, the jury should find for the defendant, even though they may believe from the evidence, that the defendant, its agents, servants or employés, in charge of the train by which said horses were being transported, were themselves negligent."

3. "The negligence of Chester Frakes and Horace Moore, if either or both were negligent, was the negligence of the plaintiffs."

4. "If the jury find for the plaintiffs, they should find for them such sum in damages as they believe from the evidence, would fairly and reasonably represent the fair market value at Lexington, Kentucky, of the Chestnut colt by Star Shoot, dam, Last Cherry, the chestnut colt, by Star Shoot, dam Blue Danube, and the bay filly, by Miller, dam, Lady Beth, at the time of the accident, and such further sum in damages as they may believe from the evidence, would fairly and reasonably represent the difference, if any,
574 between the fair market value of the remainder of said horses in the condition they were in immediately before the accident, and their value at such reasonable time after the accident, as the extent of their injuries, if any, traceable directly to the accident in question, has been, or might have been ascertained, not exceeding in the aggregate $24,525.00, the amount sought in the petition."

5. "Negligence, as used in these instructions, is a failure to use ordinary care. Ordinary care, is such care as a person of ordinary prudence would exercise under like, or similar circumstances."

6. "Nine or more jurors may make a verdict. If less than the whole concur, the verdict should be signed by those concurring."

And, in order that we may have before us appellant's view of the law governing the case, we copy the instructions asked on its behalf, but not given. They are as follows:

A. "If the jury believe from the evidence, that Chester Frakes and Horace Moore or either of them, the attendants in charge of the horses, failed to use such care in the discharge of his duties as persons of ordinary prudence engaged in the same business usually exercise under like conditions to those in evidence, and that but for such failure on his part, if any, the fire would not have occurred they should find for the defendant."

B. "If the jury believe from the evidence that the fire in question was caused by the lanterns or either of them in the car,
575 they should find for the defendant."

C. "If the jury believe from the evidence that the alleged injuries to the horses in question were caused by a fire inside of the car in which the horses in question and Chester Frakes and Horace Moore, plaintiffs' attendants in charge of said horses were then being carried, and that such fire was caused by any negligent or careless

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act or acts on the part of such attendants, and that but for such act or acts, if any, such fire would not have occurred, they should find for the defendant."

C½. "The court instructs the jury that the negligence or carelessness of Chester Frakes and Horace Moore, if either or both of them were negligent or careless in the performance of their duties, or any of them, was the negligence or carelessness of the plaintiffs.

D. "If the jury find for the plaintiffs they will fix the damages in such sum as would represent the fair market value at Frankfort, Kentucky, of such of said horses as were killed, and in addition thereto such further sum as will compensate them for the difference, if any, between the value of such other of the horses in question as were injured, if any, *between the value of such other of the horses in question as were injured, if any,* just before they were injured, and their respective values after the extent of their respective injuries were reasonably ascertained."

E. "Unless the jury believe from the evidence that the fire in question was caused by the negligence of the defendant, that is, by its failure to use such care as persons of ordinary prudence engaged in like business, exercise under similar conditions, they should find for the defendant."

576 It will be seen that instructions 2 and 3 given, are, in substance, the same as instructions C and C½ asked by appellant, and substantially presented its view of the law to the jury, upon the point of contributory negligence.

3. Finally, it is complained that the instructions are otherwise erroneous; and, for specifications, it is urged (*a*) that they afforded the jury no guidance in measuring the respective duties of the plaintiffs and the defendant through their agents; (*b*) that the term "negligence" as defined by the fifth instruction, authorized the jury to apply that term to any act to which they might choose to apply it; and (*c*) that they left it to the jury to excuse the attendants Frakes and Moore for any act for which the jury might wish to excuse them. It is a general rule that it is not the duty of the trial court to deal separately with particular phrases or fragments of the testimony, and instruct thereon. The instructions have been heretofore set out in full in this opinion and speak for themselves. In our opinion they fairly and fully presented the law upon the issues raised by the pleadings. Recurring to the instructions, and reviewing them as a whole, it will be seen that by instruction No. 1, the jury were told, in appropriate terms, that if the defendant

577 company, or its agents, or servants, or employés struck or bumped the car in which the plaintiffs' horses were being hauled against the engine or other cars in a negligent manner, and said negligence, if any, on the part of the defendant caused one of the lanterns used by plaintiffs to set fire to the contents of the car, and to injure plaintiffs' horses, or any of them, they should find for the plaintiffs, unless the plaintiffs, or their attendants in charge of said horses were, or either of them, was guilty of negligence as explained in instruction No. 2. Instruction No. 1½ is the con-

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verse of instruction No. 1, and was evidently given out of abundant caution, and for the purpose of presenting defendant's view of the case, independently of the first instruction. Instruction No. 2 covered appellant's view of the case, that the negligence of Frakes and Moore caused the injuries, and was drawn in as strong terms as appellant could have asked. The fourth instruction fixed the measure of damages in case the jury should find for the plaintiffs, at the fair market value at Lexington, Kentucky, of the horses killed, at the time of the accident, and the fair and reasonable difference between the fair market value of the injured horses in the condition they were in immediately before the accident, and their value
578 after the accident. Indeed, this instruction upon the measure of damages is substantially the same as Instruction D offered by the appellant.

Appellant insists, furthermore, that the court should have given instruction B asked by it, and set out above, in full. This instruction, of course, was asked upon the theory that there was no unusual or unnecessary movement of the car to cause the lanterns therein to fall and set fire to the car. That, in effect, was to ask a peremptory instruction on behalf of the appellant, since it is manifest from the evidence that the fire was caused by the lanterns, or by one of them. The controlling question, however, as we understand the law of the case, was not whether the lanterns caused the fire, but what caused the lanterns to break and fall; and that question was properly submitted to the jury. In our opinion the instructions fairly and fully presented the law of the case.

4. Appellant filed its brief upon this appeal on August 31, 1912, and the action was submitted in this court on October 17, 1912. On January 24, 1913, appellant tendered a supplemental brief, suggesting, for the first time in this court, that the rule in this State that the limited valuation clause in contracts of shipment are not enforceable against the shipper in the absence of fraud, is in violation
579 of section 20 of the "Carmack Amendment" to the Act of Congress known as the Interstate Commerce Law. It is now claimed, for the first time, that under said amendment, the duty to issue a bill-of-lading and the liability thereby assumed, was fully covered by the federal act, and supersedes all State legislation and decisions upon that subject, and that the effect of said act as thus claimed by appellant had been fully upheld by the opinion of the Supreme Court of the United States in the late case of Adams Express Co. v. Croninger, decided January 6, 1913, and reported in 226 U. S., page 491.

It is a well established rule of law in Kentucky that the contract of a carrier to relieve itself from its common law liability by arbitrarily fixing the value of the property carried, is in violation of section 196 of the Constitution, and void, except in cases of fraud practiced upon the carrier. Adams Express Co. v. Walker, 119 Ky., 121, 67 L. R. A., 412; Southern Express Co. v. Fox & Logan, 131 Ky., 257. The case at bar was practiced under that rule. It is, however, now pointed out that the bill-of-lading limited the carrier's liability for a stallion or jack to $150.00, and for a horse or mule to $100.00;

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and it is urged that under the "Carmack Amendment" as
580 interpreted in the Croninger case, supra, appellant's liability should have been measured at that rate. Appellees object to the consideration of this question upon the ground that it was never presented to the trial court for adjudication, and consequently is not now before this court for review.

It is an elementary rule, of almost universal application, that questions not raised in the trial court in some effective and appropriate manner, will not be considered on appeal. This rule was fully recognized in Acme Mills & Elevator Co. v. Rives, 141 Ky., 786, where we said:

"It may be considered as well settled in this jurisdiction, that no error committed during a trial is available upon appeal, unless it has been specifically relied upon in the grounds set forth in support of a motion for a new trial. L. C. & L. R. R. Co. v. Mahoney, 7 Bush, 238; Commonwealth v. Williams, 14 Bush, 297; Alexander v. Humber, 86 Ky., 569; Hatfield v. Adams, 123 Ky., 422. And this is true although objection was made and exception taken to the ruling at the proper time, as was done in this case. McLain v. Dibble, 13 Bush, 297; Harris v. Southern Railway Co., 25 Ky. L. R., 560. Unless the error of the circuit court is "specifically made a ground
581 for a new trial, it will be regarded as having been waived in that court, and is necessarily beyond the sphere of this court's supervisory jurisdiction, which is only to decide whether, on the grounds properly before it, the circuit court erred in its judgment. Hopkins v. Commonwealth, 3 Bush, 481; Slater v. Sherman, 5 Bush, 211; Civil Code, section 343."

Furthermore, a blanket assignment "of error of law occurring at the trial and excepted to at the time," as we have in the seventh and last ground assigned for a new trial in the case at bar, is not sufficiently specific to raise any question upon appeal. Muex v. Muex, 81 Ky., 475; L. & N. R. R. Co. v. McCoy, 81 Ky., 403; American Credit-Indemnity Co. v. National Clothing Co., 122 S. W., 840. The office of the pleadings is to make plain the issues between the parties; and upon the issues thus raised the parties are entitled to have the case tried.

Bearing in mind these elementary rules of pleadings and practice, and turning first to the pleadings, we find no federal question suggested anywhere. The answer, filed February 27, 1911, contained a traverse of the petition and an affirmative plea of contributory negligence upon the part of Frakes and Moore, the attendants
582 in charge of appellees' horses. The reply, filed March 10, 1911, closed the pleadings. Up to that time the bill-of-lading, which constituted the contract of shipment had not appeared in the record, the appellant having prepared its defense strictly under the State law, without even an attempt to raise a federal question. However, on November 9, 1911, upon motion of appellant, the appellees filed the bill-of-lading. The trial began on December 18, 1911, and was concluded on the 22nd of that month, when the jury returned the verdict heretofore indicated. On the next day, December 23,

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1911, appellant entered its motion, upon grounds then filed, for a new trial; but nowhere in the seven grounds distinctly and separately set forth as required by the Code, is a federal question of any kind suggested. Neither did the additional grounds for a new trial, filed on January 6, 1912, suggest any such question. The first and only reference, either directly or indirectly, to the federal question now suggested, is contained in the order of February 3, 1912, which, after directing the filing of certain affidavits to be read on the motion for a new trial, and which in no way bore upon or suggested the federal question, closed as follows:

583 "Thereupon the court heard argument by counsel for plaintiffs and defendant respectively upon the motion and grounds for a new trial of this cause filed herein by the defendant, Louisville & Nashville Railroad Company; and also heard said counsel upon the federal question raised by the defendant as to whether the contract in question for the transportation of said colts and fillies mentioned in the petition from Lexington, Kentucky, to Juarez, in the Republic of Mexico, was in violation of the provisions, or any of them, of an act of Congress of the United States entitled an act to regulate commerce, approved February 4, 1887, as amended by an act approved March 2, 1889, by an act approved February 10, 1891, by an act approved February 8, 1895, by an act approved June 29, 1906, by a joint resolution approved June 30, 1906, by an act approved February 25, 1909, and by an act approved June 8, 1910; and having considered the said motion and grounds for a new trial of this cause, and having also considered the said federal question and being of the opinion that said contract did not and does not violate any of the provisions of said act of congress, the motion is hereby overruled and a new trial is refused."

It will be noticed that this order recited the fact that the court heard counsel upon the question whether the contract of ship-
584 ment mentioned in the petition was in violation of any of the provisions of the Act of Congress to regulate commerce, giving the date of the act and the amendments thereto; and that the court, having considered the motion and grounds for a new trial, and the said federal question, was of opinion that the contract did not violate said Act of Congress. By that order, however, the court overruled no motion of appellant based upon a federal question, since no such motion had been made.

In view of the fact that the question had been nowhere raised by the pleadings, instructions, or motion for a new trial, or by a motion of any kind, we must conclude that it was raised orally, and was discussed as an academic question. But, under section 115 of the Civil Code of Practice, pleadings are required to be in writing; by sub-section 5 of section 317 instructions must be in writing; and under sub-section 1 of section 624, even notices are required to be written. A mere oral request of the trial court to instruct upon any given question brings no question before this court for review. Bell v. Louisville Railway Co., 148 Ky., 189. The bill of lading contained a limitation of appellant's liability, which appellee was not required to plead. If appellant had desired to take advantage

of its limited liability unquestionably it was its duty, under
585 the Code of Practice, to specifically rely upon it in its answer. This it wholly failed to do.

The futility of appellant's attempt to raise the question, for the first time, and orally, upon the argument of the motion for a new trial, will be easily realized if we could conjecture what order the court could or would have entered, in case it had been of contrary opinion, to-wit, that the bill-of-lading did violate the provisions of the Interstate Commerce Act. It could not have sustained the motion for a new trial, because it was confined to the grounds specified; Civil Code of Practice, sec. 343; Harris v. Southern Ry., 25 Ky. L. R. 559; 76 S. W. 151. Neither could it have given judgment for the appellant upon the pleadings and notwithstanding the verdict, because no federal question was suggested by the pleadings. At most, the federal question was merely raised and discussed academically, after the trial had been completed, at a stage of the proceedings too late to bring it before this court. The reason given for the rule that a question not raised in the trial court will not be noticed on appeal because to do otherwise would deprive the opposite party of the proper opportunity of avoiding the effect of the objection by amendment, or by supplying any defects in his pleadings, applies strongly here.

586 Furthermore, the federal question now suggested was not only ignored in Instruction D, offered by appellant upon the measure of damages, but, it will be noticed that by that instruction appellant, practicing under the State law, asked the court to direct the jury, in case it should find for the appellees, to fix the damages in such sum as would represent the fair market value of the horses at Frankfort, of such as were killed, and the difference between the value of the horses that were injured and their value just before they were injured. By referring to Instruction 4 given by the court, it will be seen that that instruction lays down the same measure of damages.

It is a well settled rule in this jurisdiction, that a litigant cannot complain of an instruction which is the same, or is to the same effect, as one he requested. Toner's Admr. v. South Covington & C. St. Ry. Co., 109 Ky., 41; Union Central Life Insurance Co. v. Hughes, 110 Ky., 26; First National Bank v. Germania Safety Vault & Trust Co., 112 Ky., 734; L. & N. R. R. Co. v. Penrod's Admr., 24 Ky. L. R., 50, 66 S. W., 1013, 1042; Stowers v. Singer, 113 Ky., 584; Harris v. Southern Railway Co., 25 Ky. L. R., 559, 76 S. W., 151.

587 As was said in First National Bank v. Germania S. V. & T. Co., supra:

"When the instructions offered by the appellant were subject to the same fault as the ones given by the court, there should not be a reversal for such error. Insurance Co. v. Hughes' Admr. 110 Ky. 26."

Furthermore, it is well settled that it is not the duty of the trial judge, in a civil case, to give all the law of the case; if a party desires an instruction upon a question upon which no instruction is given, he must ask it in order to put himself in a position to have

the question reviewed. J. B. Pilcher Mfg. Co. v. Teupe's Extx., 28 Ky., L. R., 1350, 91 S. W., 1125. His failure to request an instruction precludes objection on the ground that those given were not complete. Patterson v. T. J. Moss Tie Co., 30 Ky. L. R. 9, 97 S. W., 379. Not only did appellant fail to raise the question by his pleadings, or by a requested instruction, but he tried the case throughout under the State law governing the question; and a rule permitting a litigant in an instance like this, to commit himself by his pleadings to one theory of the case and try it throughout upon that theory, and subsequently to seek its reversal upon a question not theretofore raised, and after his opponent's opportunity to meet the newly suggested question has passed, would inevitably lead, not only to
588 a miscarriage of justice, but to a waste of the time of the tribunals provided by the State for the administration of justice. The federal question now suggested was not raised in the trial court; is not before us for review; and cannot be considered or decided.

Judgment affirmed.

R. A. Thornton, Lexington, Ky.; Benjamin D. Warfield, Louisville, Ky.; Charles H. Moorman, Louisville, Ky., for Appellant.

Robert B. Franklin and Robert C. Talbott, of Frankfort and Lexington, Ky., for Appellees.

[Endorsed:] Feb. 21/13. L. & N. vs. Woodford, &c.

589 Afterwards at a Court of Appeals held as aforesaid on March 13, 1913, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
WOODFORD, &c.

Fayette.

Came the appellant by counsel and tendered a petition for rehearing and moved the court to file same, which motion is passed for notice.

Afterwards at a Court of Appeals held as aforesaid on March 19, 1913, the following order was entered, to-wit:—

L. & N. R. R. Co.
vs.
WOODFORD, &c.

Fayette.

Came the appellant by counsel and filed a notice and on motion the petition for rehearing heretofore tendered is now ordered to be filed and the motion for a rehearing is submitted.

The following is a copy of the petition for rehearing filed by the foregoing order:

590 *Points and Authorities.*

1 and 2. It was not essential that the Federal question should have been raised in the trial court.

Section 709 Revised Statutes of the United States.
Columbia Water Power Co. v. Columbia Street Railway Co., 172 U. S. 475, 488.
Yazoo & Miss. V. R'y Co. v. Adams. 180 U. S. 1, 14, 15.
Chapman v. Goodnow, 123 U. S. 540.
Dewey v. Des Moines, 173 U. S. 199.
Erie Railroad Co. v. Purdy, 185 U. S. 148.
Mutual Life Insurance Co. v. McGrew, 188 U. S. 291.
Eastern Building Ass'n v. Welling, 181 U. S. 47, 49.
Spies v. Illinois, 123 U. S. 131.
Jacobi v. Alabama, 187 U. S. 133.
Layton v. Missouri, 187 U. S. 356.
Oxley Stave Co. v. Butler County, 166 U. S. 655.
Sayward v. Denny, 158 U. S. 180.
Sweringen v. St. Louis, 185 U. S. 38, 45, 46.
Chappell v. Bradshaw, 128 U. S. 132.
Winona & St. P. Land Co. v. Minnesota (No. 2), 159 U. S. 540.

3. The courts must take judicial notice of the Interstate Commerce Law, and its amendments, and is presumed to have cognizance of its enactment and existence, and it is not necessary to even refer in the pleadings to the statute.

Missouri, Kansas and Texas Railway Company, Plaintiff in Error v. Sallie C. Wulf (January 6, 1913), 226 U. S. 570.

591 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus.
CATESBY WOODFORD and JOHN IRELAND, Appellees.

Appellant's Petition for Rehearing.

The opinion will be found in 152 Ky. 398.

We respectfully petition for a rehearing of this case because we are sincerely of the opinion that the court has inadvertently fallen into an error in its conclusion that the Federal question in the case should have been pleaded by the defendant in the court of original jurisdiction, and that not having been there pleaded the question could not be raised in the Court of Appeals.

We will consider the general question under three heads, first, was it essential that the Federal question should have been raised in any form in the trial court? Second, within what time should the Federal question be presented; and third, was it essential that it should have been specially pleaded by the defendant as a defense in the trial court?

We sincerely think that each of those questions must be
592 answered in the negative, and we shall first discuss the questions under headings one and two together, and the third last.

I and II.

First, was it essential that the Federal question should have been raised in any form in the trial court; Second, within what time should the Federal question be presented?

Section 709 of the Revised Statutes of the United States is as follows:

"SECTION 709. (Judgments and decrees of State courts on writ of error.) A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

593 "The Supreme Curt may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

It is under this statute that the Supreme Court of the United States obtains jurisdiction to review by writ of error the final judgment of the respective courts of final jurisdiction of the different States.

It will be observed that under that section there are three classes of cases in which the final judgment of a State court may be reexamined by the Supreme Court.

In Columbia Water Power Co. v. Columbia Electric Street Railway, Light & Power Co., etc., 172 U. S. 475, 488, the Supreme Court thus classified those cases, viz.:

"(1) Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;

"(2) Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;

"(3) Or where any title, right, privilege of immunity is claimed

under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority."

What is the Federal question in the case now at bar upon which it must turn, and within which of those classifications does
594 the case fall? Plainly, it is whether the operation and effect of the contract in question for the shipment of the stock mentioned therein from the State of Kentucky to the foreign country—the Republic of Mexico, named in the contract or bill of lading, is governed by the local law of the State of Kentucky, or by the Act of Congress of the United States regulating commerce between the States, and between any place in the United States and any foreign country.

In other words, whether the local law of this State as declared by this court in its decisions in Adams Express Company v. Walker, 119 Ky. 121; Southern Express Co. v. Fox & Logan, 131 Ky. 257, and other cases, is repugnant to the said Acts of the Congress, enacted under the authority of the commerce clause of the Constitution of the United States.

Our contention, as appears from the order of the Fayette Circuit Court entered in the case on February 3, 1912 (which was discussed by this court in its opinion), and from the printed briefs filed by appellant in this court on January 24, 1913, and February 14, 1913, respectively, and considered by this court, has been and is that, said contract of transportation is governed by the said Acts of Congress of the United States, and not by said local State law.

As the Federal question involved in this case is, whether the said local law of the State of Kentucky is repugnant to the provisions, or any of them, of the Interstate Commerce Act, and especially to the 20th section of the amendment of June 29, 1906, generally
595 referred to as the Carmack Amendment, it requires no argument to show that the case now under consideration falls within the second clause of said Section 709, and within the second of the said three classifications announced in the Columbia Water Power Company's case, supra, and that it does not fall within the third of said classifications.

Now, it is in the latter class of cases only that the statute requires that, the "title, right, privilege or immunity" relied upon by the party must be "specially set up or claimed."

That point is expressly and clearly decided by the Supreme Court in the Water Power Company's case, supra, where the court says:

"There is no doubt that under the third class the Federal right, title, privilege or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. Spies v. Illinois, 123 U. S. 131, 181; French v. Hopkins, 124 U. S. 524; Chappell v. Bradshaw, 128 U. S. 132; Baldwin v. Kansas, 129 U. S. 52; Leeper v. Texas, 139 U. S. 462; Oxley Stave Co. v. Butler County, 166 U. S. 648."

In the last cited case, it is, also, clearly and emphatically held,

that where the case falls within the first or second of the classes designated by the statute; and stated in said opinion, that, if the Federal question appears in the record and was decided or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive
596 against a review of such question by the Supreme Court.

The language of the court upon that subject is as follows, viz:

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a State statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. Miller v. Nicholls, 4 Wheat., 311; Willson v. Blackbird Creek Marsh Co., 2 Pet. 245; Satterlee v. Matthewson, 2 Pet. 380, 410; Fisher's Lessee v. Cockerell, 5 Pet. 248; Crowell v. Randell, 10 Pet. 368; Harris v. Dennie, 3 Pet. 292; Farney v. Towle, 1 Black, 350; Hoyt v. Shelden, 1 Black, 518; Railroad Co. v. Rock, 4 Wall. 177; Furnman v. Nichol, 8 Wall. 44; Kaukauna Co. v. Green Bay, etc., Canal, 142 U. S. 254."

The rule so clearly laid down in the Water Power Company's case is not a novel doctrine, but has obtained from a very early date, so early, indeed, as Martin v. Hunter's Lessee, 1 Wheaton, 355, under Section 25 of the Judiciary Act of 1789, repealed by Section 709, supra (Act of Feb. 5, 1867), and that rule has been consistently followed by the Supreme Court ever since.

In Yazoo and Mississippi V. Ry. Co. v. Adams, 190 U. S., 1, 14,
15, the Supreme Court said:

597 "In short, the case is one of those frequently arising under the second clause of Rev. Stat., Sec. 709, in which the validity of a state statute under the Constitution of the United States is necessarily drawn in question, and the decision of the State court being in favor of its validity, this court will take jurisdiction, though the Federal question be not specially set up or claimed. *As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section where a right, title, privilege or immunity is claimed, that the Federal question must be specially set up.** The cases are collected in Columbia Water Power Company v. Columbia Electric Street Railway Company, 172 U. S. 475, 488. Thus, in Willson v. Blackbird Creek Marsh Co., 2 Pet. 245, the record did not show that the constitutionality of an act of a State legislature was drawn in question; but, said the Chief Justice, we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the State court. So, in Satterlee v. Matthewson, 2 Pet.

*Italics ours.

380, it was said that if it sufficiently appear from the record itself that the repugnancy of the statute of a state to the Constitution of the United States was drawn in question, this court has jurisdiction, though the record does not in terms declare that this question was raised. See also Cowell v. Randell, 10 Pet. 368; Furman v. Nichol, 8 Wall. 44; Chicago Life Ins. Co. v. Needles, 113 U. S. 574; Eureka Lake, etc., Co. v. Yuba County, 116 U. S. 410; Kaukauna Co. v. Green Bay & Mississippi Canal, 142 U. S. 254. And the fact that the Supreme Court of the State did not expressly refer to the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision. As was said by Chief Justice Waite in Chapman v. Goodnow, 123 U. S. 540, 548: If a Federal question is fairly
598 presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the Revised Statutes, as if it had been specially referred to and the right directly refused."

In view of the character and number of the cases cited by the Supreme Court itself in support of its position in the Water Power Company's case and the Yazoo and Mississippi Valley Railway Company's case, it would be mere parade for us to make extracts from or cite other cases in support of the proposition that it is not necessary to plead or "specially set up" the Federal question relied on in cases arising under the first and second clauses of said Section 709, but that it is necessary to do so only where the case arises and falls within the third clause thereof.

As we have shown, if the Federal question falls within either the first or second clauses of the statute, it is sufficient if the attention of the State court having final jurisdiction of the case was unmistakably called to the question before final judgment, or that the decision thereof was necessarily involved in the disposition of the case.

In deciding a case which arose under the said third clause of the statute the Supreme Court held in Sweringen v. St. Louis, 185 U. S. 38, 45, 46.

"We do not hold it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the
599 parties claiming the right, or must have been in some way presented to the court."

In considering a case which came within the second class of those provided for in Section 709 this court said:

"Under the second class it may be said to be the result of the rulings in this court that if the Federal question appears in the record in the State court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here. Columbia Water Power Co. v. Columbia Street Railway, etc., Co., 172 U. S. 475, and cases cited on p. 488."

If the Federal question has been fairly presented to the State

court, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it is as much against the right as if it had been specifically referred to and the right directly refused. Chapman v. Goodnow, 123 U. S. 540, 548.

In that case the court used the following language, viz.:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the
600 Revised Statutes, as if it had been specifically referred to and the right directly refused."

To the same effect is Dewey v. Des Moines, 173 U. S. 199, where it is held that:

"Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the State court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law."

Unless the proper distinction is drawn as to the character of the respective Federal rights provided for in the several clauses of said section 709, the decisions of the Supreme Court rendered in cases which fall within clauses one and two of said section would be absolutely irreconcilable with those which have been rendered in those cases which fall within clause third of said section, as respects the question of the necessity of "specially setting up" or claiming the Federal question in such manner as to confer upon the Supreme Court the power to reverse, modify, or affirm the judgment or decree of the State court.

It is the failure to observe that distinction which has produced so much confusion, and has resulted in the great number of
601 cases which have gone up to the Supreme Court under Section 709, and has caused that court in Eastern Building Ass'n v. Welling, 181 U. S. 47, 49, to say:

"The error involved in the argument arises from failing to observe that the particular character of Federal right which is here asserted is embraced within those which the statute requires to be specially set up or claimed. The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred, and especially in the latest case cited, Columbia Water Power Co. v. Columbia Street Railway Co., supra."

We frankly admit that there is a line of cases of the Supreme

Court which hold that jurisdiction will not there be held of any case in which the Federal question relied on was one of those provided for in the third clause of said Section 709, and was not specially raised in the court of original jurisdiction, but was attempted to be raised for the first time in the State court of final appellate jurisdiction, and rejected by such court because it was made too late.

Of that character were the cases of Spies v. Illinois, 123 U. S. 131; Jacobi v. Alabama, 187 U. S. 133; Layton v. Missouri, 187 U. S. 356; Oxley State Co. v. Butler County, 166 U. S. 655; Mutual Life Insurance Co. v. McGrew, 188 U. S. 291; Sayward v. Denny, 158 U. S. 180; Chappell v. Bradshaw, 128 U. S. 132; Winona & St. P. Land Co. v. Minnesota, (No. 2), 159 U. S. 540; Erie Railroad Co. v. Purdy, 185 U. S. 148.

602 There are a number of other decisions of the Supreme Court upon the question, but as they are all to the same effect, we have cited only those which seem to be most frequently referred to by the court itself.

In the case of Mutual Life Insurance Co. v. McGrew, supra, the question of the jurisdiction of the Supreme Court was asserted under the third of the classification of cases enumerated in Section 709, and the court held that it was in that class of cases only, that the title, right, privilege or immunity relied on must be specially set up or relied upon, and at the proper time and in the proper way; and that the proper time was in the trial court "whenever that is required by the State practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised;" and, as the particular class of Federal questions embraced in the said third classification are required by said Federal statute itself to be "specially set up;" and, as in those States where the practice is as above stated, there is no manner or place except in the trial court where those particular Federal rights can be "specially set up or relied upon," therefore, the Supreme Court must decline jurisdiction where the Federal question is asserted under the third of the classes of cases enumerated in Section 709, as the power of the Supreme Court to review the final judgments or decrees of the State courts is purely statutory, derived solely from said section.

In discussing this question in said Mutual Life Insurance Company's case, the court said, page 308:

603 "In Baltimore & Potomac Railroad Company v. Hopkins, 130 U. S. 210, the distinction between the denial of validity and the denial of a title, right, privilege or immunity specially set up or claimed, is pointed out, as well as the distinction between the construction of a statute or the extent of an authority and the validity of a statute or of an authority.

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Section 709, and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required

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by the State practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. Spies v. Illinois, 123 U. S. 131; Jacobi v. Alabama, 187 U. S. 133; Layton v. Missouri, 187 U. S. 356; Erie Railroad Company v. Purdy, 185 U. S. 148.

"The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. Loeb v. Trustees, 179 U. S. 472, 481."

The case of Erie Railroad Co. v. Purdy, 185 U. S. 148, above cited, well illustrates both the existence and the application of the principle now under consideration.

The Supreme Court refused to take jurisdiction in that case upon the ground that it fell within the third class of cases enumerated in Section 709, and that the Federal question had not been raised or specially set up or claimed in the trial court. Nevertheless, the court also held as follows, viz. (p. 153):

604 "So, if the highest court of the State, by its final judgment, sustains the validity of a State enactment drawn in question there as repugnant to the Constitution, treaties or laws of the United States, or denies a right, privilege or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute or authority exercised under the United States, this court could review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court."

If the principle for which we are now contending was not correct, then the said language of the court is in irreconcilable conflict with its judgment, "dismissed for want of jurisdiction in this court."

Accepting and regarding the principle, however, and there is not only no conflict, but absolutely harmony between said language and the judgment.

Upon the point, that, even if it was necessary to raise the Federal question in the trial court (which, for the reasons given, we deny) still it was not essential that it be pleaded, we refer to Mutual Life Insurance Co. v. McGrew, above cited, and to the authorities cited in our printed briefs filed in this cause on January 24, and February 14, 1913, respectively, which we make parts of this petition, as fully as if copied at length herein.

We respectfully submit that, as the case now under consideration does not fall within the class of cases enumerated in the third clause of Section 709; and as the attention of this court, at least, was unmistakably called to the Federal question involved in the case some time before the final decision of the case by this court; and, as

605 either the local law of Kentucky, as decided by this court in Adams Express Company v. Walker, 119 Ky. 121; Southern Express Company v. Fox & Logan, 131 Ky. 257, and affirmed in subsequent cases, or the Federal law as declared in the Interstate Commerce Acts, especially in the 20th section of the Carmack Amendment; one or the other, must govern this case, and as the necessary effect of the judgment was to uphold and apply the Kentucky law in the decision of the case, it follows that as the Federal question claimed and relied on by the appellant was called to the

attention of the court within the required time, and in a sufficient manner, a rehearing should be granted and the case reversed.

III.

The courts of the country are presumed to take judicial cognizance of the Interstate Commerce Law and its amendments, and it is not necessary to refer to the statute in the pleadings.

When the Congress of the United States, in the exercise of the power conferred upon it by the Constitution to regulate commerce with foreign nations, and among the several States, adopted the Act to Regulate Commerce, which was approved February 4, 1887, and the subsequent amendatory acts thereof, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much a policy for the State of Kentucky as if those acts had emanated from its own Legislature.

606 It is elementary that the respective State courts must take judicial notice of the public statutes of the United States as well and to the same extent as of the public statutes of the State itself. It is also elementary that the acts of the Congress prove themselves. It is unnecessary to cite authorities to establish those principles.

In the case now under consideration it must be presumed that the Fayette Circuit Court, in which the case was tried, and that this court were cognizant of the enactment of the original Interstate Commerce Law and of the respective subsequent amendments thereof, including the Amendment of June 29, 1906, and it was, therefore, not necessary to plead those acts.

In Missouri, Kansas and Texas R'y. Co. v. Sallie C. Wulf, 226 U. S. 570, decided by the Supreme Court on January 6, 1913, the defendant in error, Sallie C. Wulf, brought suit on January 23, 1909, in her individual capacity, as the sole heir, next of kin, and beneficiary of the estate of Fred S. Wulf, deceased, in the circuit court of the United States for the eastern district of Texas, to recover damages by reason of the death of her son while he was in the employment of the defendant company as locomotive fireman.

The original petition asserted a cause of action under the laws of Kansas without making reference to the Federal Employers' Liability Act, under which statute the plaintiff, although sole beneficiary, could not maintain the action except as personal representative. On May 19, 1909, the defendant filed its original answer, which consisted of a general demurrer, general denial of the

607 allegations of the petition, averments of contributory negligence and other affirmative allegations. No steps were taken upon the pleading until January 6, 1911, when the defendant filed an amended answer, which, among other averments, alleged that the cause of action was not governed by the laws of Kansas, but arose out of the said Federal Employers' Liability Act. On the same day plaintiff filed her first amended petition, averring, among other things, that when the original petition was filed there was no administration upon the decedent's estate, but that on January 4, 1911,

she was appointed temporary administratrix of his estate by a court of competent jurisdiction, which she named. She made other affirmative averments, which are not necessary to be stated. That amended petition was allowed to be filed by the court and the plaintiff was permitted to prosecute the action as the personal representative of the decedent for her individual benefit, as well as in her individual capacity. Thereafter the defendant filed its second amended answer, and, among other things, excepted to that portion of her said amended petition making her a party as temporary administratrix, because the amendment making her a party in that capacity was filed more than two years from the time the alleged cause of action accrued, and for that the cause of action, if any, was barred by the limitation of two years. All the exceptions being overruled, a trial was had upon the issues of fact, and resulted in a verdict and judgment in favor of the plaintiff, which was
608 affirmed by the Circuit Court of Appeals for the Fifth Circuit, and the case went to the Supreme Court by writ of error.

Among other points raised by the plaintiff in error in the Supreme Court was that the original petition asserted a right of action under the laws of Kansas, without making reference to the Act of Congress—the Federal Employers' Liability Act of 1908.

In answer to that point the Supreme Court said:

"It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. *But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment it had the effect of superseding State laws upon the subject. Therefore the pleader was not required to refer to the Federal Act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.*" *

Here we have a recent, distinct and emphatic announcement of the principle by the Supreme Court that the courts of the country are presumed to take judicial cognizance of a public statute of Congress, establishing a policy general in its application to all the States, and to all the people thereof, such as the Federal Employers' Liability Act of April 22, 1908, which supersedes all State laws, and special, local, State policies, upon the subject; and that it is not necessary for the pleader even "to refer to the Federal act."

609 May we not here exclaim with the exquisite Roman poet and sturdy philosopher, "Mutato nomine de te fabula narretur." Change but the name from Federal Employers' Liability Act to Interstate Commerce Act, and the rule applies as well to the one statute as to the other. They each announce a principle and policy general in its application in all the States; supreme within their respective spheres over any State law, whether constitutional,

* Italics ours.

legislative, or judicial, of which the courts of the country must take judicial notice, and are presumed to be cognizant, and to which the pleader is not required even to refer.

It seems to us that the Wulf case is, of itself, conclusive of the question under consideration.

To permit the appellees in this case to recover on the basis of values greatly in excess of those fixed for the horses when they shipped them, and on which values the freight rate was based, and which the judgment does, would be to permit a discrimination under the Hepburn Act of June 29, 1906, in favor of these plaintiffs, as against those in the Croninger and other cases herein cited, as well as in all other cases that follow the decisions in those cases. Whereas one of the things—and probably the chief thing—that said Act was designed to prevent was the practicing of any discrimination whatsoever by the carrier in favor of one shipper as against other shippers.

Suppose, for the sake of the argument, that appellant, notwithstanding the fact that these horses were shipped at a low rate
610 in consideration of the agreed valuation of $100 a head, had wanted to favor appellees, and had agreed with them that it would waive its right to insist that it would settle for the injured horses only on the basis of $100 a head, but, on the contrary, would pay for them on the basis of the verdict of the jury in this case, would not such a concession on appellant's part have been clearly a discrimination in appellees' favor such as the Act forbids and, therefore, void? If so, will this court force appellant to do that which it would have been a plain violation of law for appellant to have done voluntarily?

In other words, the Hepburn Act, as construed by the Supreme Court of the United States in the Croninger (226 U. S. 491), Miller (226 U. S. 513) and Latta (226 U. S. 519) cases, decided January 6, 1913, and in the more recent decision of the same court of Wells, Fargo & Co. v. Nieman-Marcus Co., decided February 24, 1913, must be treated as having been written, by operation of law, into every limited valuation contract made between shipper and carrier since the Hepburn Act was amended by the Act of June 29, 1906, and neither the shipper nor the carrier could, if he would, avoid the effect of such interpellation of the law into the shipping contract.

We respectfully ask that the opinion heretofore delivered in this case be withdrawn, and that the judgment of the Fayette Circuit Court be reversed.

Respectfully submitted,

CHARLES H. MOORMAN,
BENJAMIN D. WARFIELD,
R. A. THORNTON,
Counsel for Appellant.

611 Afterwards at a Court of Appeals held as aforesaid on the 21st day of March, 1913, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
WOODFORD, &c.

Fayette.

Came the appellees by counsel and moved the court to grant them 10 days to file a response to the petition for rehearing herein and the court being advised time is given until Tuesday, March 25th, to file such response.

Afterwards at a Court of Appeals held as aforesaid on March 25, 1913, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
WOODFORD, &c.

Fayette.

Came the appellees by counsel and filed a response to the petition for rehearing herein with notice.

The following is a copy of the response to the petition for rehearing filed by the foregoing order:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Response to Petition for Rehearing.

Although the appellant comes forward by petition for re-hearing to complain of the judgment of the lower court, yet it is noticeable that appellant does not refer to or cite any Kentucky case to
612 show that any of the conclusions to which this Court arrived were incorrect in any respect or counter to any former decision of this Court. The opinion herein was full of references and citations in support of the principles therein announced and the state procedure and practice therein recognized and so correctly stated that counsel for appellant can cite no authority to the contrary, and can contend for no different construction of the authorities cited in the opinion. Unable to question a single conclusion or the authorities upon which the opinion was based, appellant simply renews the questions whether or not it is in a position to prosecute an appeal to the Supreme Court. This petition for rehearing is evidently the result of a strong conviction on the part of the appellant that it is not, or that if it can nominally prosecute an appeal, that it can accomplish nothing by appeal to the Supreme Court because of the state

of the record and particularly because of its failure in the trial court to file any answer making such a defense, and more particularly because it, in the trial court, asked an instruction, in the event the jury should find for the plaintiffs, to find the full market value of the horses. Appellant steadfastly refuses in its several briefs and in its petition for re-hearing to refer to this feature of the case, or to suggest what means of escape would be possible from the predicament in which it finds itself in the record of the trial court showing that it asked such an instruction and failing to show that it asked the court at any time to limit the recovery to $100.00 each for the horses. The Supreme Court will do nothing for a litigant in such a situation, and the appellant is fully aware of that fact. Hence this petition for re-hearing instead of an appeal to the Supreme Court.

613 Appellant inquires "first, was it essential that the federal question should have been raised in any form in the trial court?" Certainly it was necessary so far as the Court of Appeals is concerned, because the Court of Appeals is an Appellate Court only and its jurisdiction in this matter is limited to passing upon errors of the lower court excepted to at the time in the lower court. This proposition is too elementary to require the citation of authorities.

Furthermore it was essential so far as the federal court is concerned.

Even if, for the sake of argument, we should concede that it was not necessary to have made those defenses by written answer in the lower court, still appellant will surely not contend that it was not necessary that this matter should have been "drawn in question" (to use the language of the Statute). Before proceeding to show that it must at least have been "drawn in question" we desire to repeat that there was no reference whatever to this contention in the lower court as the records of the lower court when carefully examined will show. Our supplemental response was filed too late to be read by the Appellate Court because we know it was filed late the afternoon before the opinion was delivered from the bench on the following day and we accordingly know the opinion was written before our brief reached the Appellate Court. In that supplemental response on pages 14, 15, and 16 we clearly show from the record that this question was not referred to at all in the lower court. We ask the court to read pages 14, 15 and 16 of that supplemental response (a copy of which is attached hereto) to verify the statement we have just made, viz: that the subject was not referred to at all in the lower court.

614 Still on page 4 of the petition for re-hearing appellant says that its contention "as appears from the order of February 3rd, 1912 in the Fayette Circuit Court" was that the contract of transportation is governed by the Act of Congress and not by any local law? We took the pains to copy in full the order of February 3rd, 1912 on page 14 of our supplemental response hereto attached and that shows exactly the contrary. But we invite the Court's attention to the order and what we heretofore wrote on that subject, pages 14, 15 and 16 of supplemental response attached.

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Hence, we say without the slightest chance of contradiction by the record of the lower court that the subject was not referred to in any form in the lower court. Not only is there an absence from the record of the lower court of this question being raised—not only is there an absence of this subject being "drawn in question" in the lower court, but the record of the lower court shows that appellant asked for an instruction in the event the jury should find for the plaintiffs, to find the full market value which affirmatively contradicts the idea that this matter was "drawn in question" in any form whatever. There was no contention about it. It was not "drawn in question" at all because the appellant asked by instruction offered by it that in the event the jury should find for plaintiffs, they should find the full market value of the horses contrary to this present claim that the plaintiffs were limited to $100.00 each in case of recovery.

Having shown that this subject was not in any form "drawn in question" in the trial court, we will proceed to show the necessity therefor as affecting appellant's right to appeal with any hope of success.

On the first page of the petition for re-hearing under points and authorities 1 and 2, appellant cites a number of cases which we will take up in the same order named.

615 Columbia Water Power Co. v. Columbia Street R. R. Co., 172 U. S., 475:

The underscoring hereafter appearing is our own.

(*Syllabus.*)

"A federal question sufficiently appears although the complaint does not mention the Constitution of the United States where the whole theory of the case is the impairment by statute of a contract created by a prior statute and the *presentation* and *decision* of this question *appear from the record* and opinion of the state court."

Yazoo & Miss. R. R. Co. v. Adams, 180 U. S., 1:

(*Syllabus.*)

"A federal question is not set up in the state court soon enough to sustain a writ of error from the Supreme Court of the United States to the state court when it is not presented until after the case has been decided by the Supreme Court of the State and remanded to the lower court for new trial, *especially when it is raised by new pleas filed* without leave of court *which the state practice requires.*"

Chapman v. Goodnow, 123 U. S., 540:

"If a federal question is *fairly presented* by the record and its decision is actually necessary to the determination of the case, a

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judgment which rejects the claim but avoids all reference to it is as much against the right within the meaning of Section 709 as if it had been specifically referred to and the right directly refused. But if a decision of such question is rendered unnecessary by the view which the court properly takes of the case, within the scope of the pleadings, the judgment is not open to review here."

Dewey v. Des Moines, 173 U. S., 199:

We quote some of the passages:

"In other words the court must eb able to see clearly from the whole record that a provision of the Constitution or Act of Congress is relied upon by the party who brings the writ of error and that the right thus claimed by him was *denied* * * * in substance the validity of the statute or the right under the Constitution must have been *drawn in question* * * * a claim or right which has never been made or asserted cannot be said to have been *denied*—a point that was never raised cannot be said to save been *decided adversely* to a party who never set it up * * *."

616 Erie R. R. Co. v. Purdy, 185 U. S., 148:

(*Syllabus.*)

"The final judgment of the highest court of a state is not reviewable in the Supreme Court of the United States as the decision in favor of the validity of a state statute challenged as repugnant to the federal Constitution, or as a *denial* of a right or immunity under such constitution where such question is *not raised*, or specially set [illegible] trial court and the Appellate Court does nothing more than *decline to pass upon the federal question because it is not raised in the trial court as required by the state practice.*"

Could we wish for anything more in point or stronger in support of our contention than this authority relied on by appellant?

Mutual Life Ins. Co. v. McGrew, 188 U. S., 291:

The court refused to take jurisdiction in the case just cited and we quote from the opinion:

"We do not find that any claim under the treaty was made in the trial court and the *rule of practice of the Supreme Court of California is that it will not pass on questions raised for the first time in that Court and which might and should have been raised in the trial court.*"

Eastern Building Association v. Welling, 181 U. S., 47:

(*Syllabus.*)

"The contentions that the decision of a state court denies full faith and credit to public acts of another state, and that the obliga-

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tion of a contract is impaired and that a party is deprived of his property without due process of law will not be considered by the Supreme Court of the United States on a writ of error to the state court where such contentions were not made in the state court until after the case had been remitted to the trial court and application was made for re-hearing."

Spies v. Illinois, 123 U. S., 131:

(*Syllabus.*)

"When application is made to this court on the suggestion of one of its number to whom a similar application had been previously addressed for the allowance of a writ of error to the highest court of a state under Section 709 of the Revised Statutes, it is the duty of this Court to ascertain whether any question reviewable here was made and decided in the court below, and whether it is of character to justify bringing it here for re-examination."

617 Jacobs v. Alabama, 187 U. S., 133:

(*Syllabus.*)

"A claim that the admission in evidence of the previous testimony of an absent witness was in violation of the federal Constitution was not specially set up at the proper time and in the proper way to confer jurisdiction on the Supreme Court of the United States to review the judgment of the highest court of a state by an assignment of error in that court which was not considered by it permissible, *because no such question had been raised in the trial court.*"

Layton v. Missouri, 187 U. S., 356:

We quote from the opinion:

"A judgment of a state court upholding a state statute which is claimed to violate the federal constitution is not reviewable in the Supreme Court of the United States where the state court declined to pass on the federal question, *because it was not raised in the trial court as required by the state practice.*"

Oxley Stave Co. v. Butler Co., 166 U. S., 655:

(*Syllabus.*)

"The validit of subscriptions by a county court to the stock of a railroad company and of a conveyance of that Company and the matter of fraud in the decree, are questions of local law or practice on which the judgment of a state court cannot be re-examined by this court."

Sayward v. Denny, 158 U. S., 180:

(*Syllabus.*)

"This Court has no jurisdiction to revise views of the principles of general law held by the state court, where there is nothing in the record to show that the court supposed that protection under the United States Constitution from its rulings was claimed."

How could the trial court in this case know that the railroad company would ever raise this question when it did not refer to it in the lower court, but on the other hand asked an instruction, if the jury found for plaintiffs, to find the full market value of the horses.

Chappell v. Bradshaw, 128 U. S., 132:

(*Syllabus.*)

"A right of error in such case cannot be maintained where the plaintiff in error *did not set up or claim in the trial court the limitation,* the benefit of which he now insists should have been accorded him.

618 How is the appellant in this case to get any standing in the Supreme Court of the United States when it not only failed to claim a limitation of $100.00 for the horses killed, but on the other hand requested the court to instruct the jury to find the full market value, if they found for plaintiffs at all.

Winona & St. P. Land Co. v. Minn., 159 U. S., 540:

(*Syllabus.*)

"Where the federal question sought to be raised in this court was not seasonably presented in the state court, the failure to do so prevents this court from acquiring jurisdiction."

What standing would appellant have in the Supreme Court of the United States when the Supreme Court of the United States sees from an inspection of this record that appellant made no question about enforcing the terms of this bill of lading in the trial court, but on the other hand moved the trial court to instruct the jury to find the full market value of the horses? Having tried out the case not only willingly but on its own motion upon this basis, what standing can appellant expect to have in the Supreme Court in its present efforts to undo what it helped to do? Can it be said that any right of appellant was denied when no such right was claimed, and when appellant instead of claiming such right ignored such right, if any it had, in requesting the trial court to instruct the jury to find the full market value of the horses, in the event they should find for plaintiffs.

So, we see from the authorities referred to by appellant that the Supreme Court would grant appellant no relief unless appellant has raised the question (and the right was denied) at the proper time, in the proper manner and in the proper court. Under decisions of this state the proper court was the trial court, and that being the case the Supreme Court will refuse appellant any relief be-
619 cause appellant did not make the question in the trial court, but on the other hand moved the court to instruct the jury to find the full market value of the horses, if they should find for plaintiffs, therefore there was no denial of the right as required before the Supreme Court would take jurisdiction.

Again, the proper manner in this state was by written pleading in the trial court, and the proper time was before the trial, and certainly before the court instructed the jury. To permit appellant to raise that question now after having failed to raise it in the trial court, and after having on the trial tried out the case in the trial court upon the basis of plaintiffs' being able to recover for the full market value of the horses, and after having moved the trial court to instruct the jury on that basis, would certainly be permitting appellant to trifle with the courts and with justice.

In this connection we are reminded of the Supreme Court of the United States in the case of Leonard against Vicksburg Railroad Company, 198 U. S., 416, recognizing the universal

"Doctrine which forbids parties from assuming inconsistent positions in judicial proceedings."

After noticing the above authorities referred to by appellant, and which we think bear out our contention, we marked many cases in the Digest and Federal Statutes Annotated to be copied, but we find that would make this reply too long and we believe further citation of authorities unnecessary.

However, we will ask the court to read our reference to a number of federal cases on pages 9, 10, 11, 12, 13 and 14 of the supplemental response hereto attached and a collection of authorities will be found in the foot notes to Hamblin v. Western Land Company, 37 Law Edition U. S., 267.

Kipley v. Ill., 42 same, 998; and re Buchanan, 39 same, 884:

620 These authorities make it clear that the federal question must be raised in the trial court (according to the practice in this State) and in the proper manner (by pleading under the practice in this State) and at the proper time (certainly before instructing the jury in this State) and that the record must show that the trial court *denied the right claimed or asserted.* Federal jurisdiction is based upon the *denial* of an alleged federal right and in this state our highest court being an Appellate Court only the record must show an *assertion of the right and a denial* of it in the trial court.

Now, we could lay aside every other fact in this case and ask this question and the answer would be fatal to the right of appellant to accomplish anything by appeal to the Supreme Court—how can it

be said that appellant was *denied* any federal right in the trial court when appellant not only did not raise such a question and have a ruling of the trial court on it, but to the contrary and ignoring any such alleged federal right as is now being asserted, moved the trial court not to limit the assessment of damages in case of recovery to the $100.00 each as per the bill of lading, but to find the full market value.

While we regret that we have gone to such great lengths, there are still many things in appellant's petition for rehearing which we have not undertaken to answer, but to take up each contention or any more of its contentions would too much tax the patience of the court Appellant's contention is wholly untenable. It is not in position to ask any relief either at the hands of this Court or at the hands of the Supreme Court.

Accordingly its petition for re-hearing should be overruled.

ROBERT B. FRANKLIN.
ROBERT C. TALBOTT.

The following Supplemental Response brief was filed with and as part of the response of appellees to petition for rehearing:

621 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Supplemental Response of Appellees.

When, long after this case had been fully briefed and submitted, Appellant filed a supplemental brief, and we filed a response, we assumed that the argument had been closed, but in view of Appellant subsequently filing another brief, we will add to what we have already said in our response the following by way of supplement thereto.

As to testifying for Ireland, he testified for himself, and no proof to the contrary was offered. The transcript of evidence (pages 26 and 27) shows what occurred with reference to the shipment of the horses, and for the purpose of this appeal, it shows all that occurred, and we were certainly justified in saying that the agent did not say anything to Ireland about there being different rates de-
622 pendent upon the valuations, etc., etc. And, inasmuch as, for the purpose of this appeal, that evidence shows all that happened, with reference to the agreement and issuing of the bill of lading, it is quite clear that nothing was said and nothing was done that would give the Appellant a semblance of a claim that there is anything in the evidence to justify such a defense as is now attempted to be interposed.

Not only did Appellant Railroad Company make no defense on this subject, when it filed its answer, setting forth fully its defenses, but in addition to this, what is disclosed by the transcript of evidence

(pages 26 and 27) being all that occurred, as far as this appeal is concerned, can the Appellant point to a single line, or a single word of testimony which would give color to any such defense as is now being attempted?

In our supplemental brief, we set out in ten sections, what the Supreme Court, in its opinion, in the case of Adams Express Company vs. Croninger, takes the trouble to recite as having been alleged by the Express Company in its answer. What is there in the evidence in this case, even in the absence of an answer, to substantiate any of those ten sections of a properly plead defense (except the first section: "that the defendant was an express company engaged in inter-state commerce within the provisions of the Act of Congress of June 29th, 1906;")?

Excluding that, there is nothing in the evidence to show the existence of any of the other nine features of the answer in the Croninger case which the Supreme Court, in taking pains to recite, must have deemed material to such a defense.

So we say that such a defense as was interposed in the
623 Croninger case is neither plead nor justified in the slightest by the evidence in this case.

The defense now being urged was not even mentioned in the very elaborate printed brief of Appellant first filed in this action, and the case was, by consent, submitted in this Court for final judgment without any reference to the subject. Long after it had been thus submitted, by consent, and without any reference to this question, Appellant comes at a late hour with a supplemental brief, for the first time raising the question in this Court, and still Appellant takes exceptions to our reference to this belated defense as an after-thought, when the record bears us out in saying that it was an after-thought. When we further say that the defense was neither referred to in the evidence nor in the answer of the Appellant Railroad Company and that the Appellant Railroad Company itself moved the lower court to instruct the jury to find, not this nominal value of $100.00 each for the horses, but the true market value of the horses, we submit we were justified not only in calling this attempted defense an after-thought, but under the circumstances, a preposterous one.

Appellant devotes many pages to showing that, in the absence of fraud or mistake, every one who signs a paper is presumed to know its contents and must be bound by the contents, etc.; but does the Appellant suppose for a moment that if it had attempted in its answer to make such a defense, that Appellees would not have plead fraud or mistake in the execution of a paper containing this provision, which neither the agent nor Ireland mentioned or discussed or had any thought of making a binding part of the bill of
624 lading? And when we say this, we still insist that, for the purpose of this appeal, the transcript of evidence shows what occurred and all that occurred as to the bill of lading, and it certainly shows that there was no talk or discussion of rates or values, and no attempt to agree on the nominal valuations in order to get a reduced rate.

This reminds us of the injustice which would be done Appellees

by considering this alleged defense without Appellant having plead it. If Appellant had plead it, Appellees were entitled to reply thereto and to make every defense thereto that they had, and to show that no such agreement was made, or entered into, or mentioned, or discussed, or contemplated, which Appellees could have done under proper allegations of fraud or mistake in signing the paper. But Appellant would have the court give it the benefit of such a defense without giving Appellees an opportunity to interpose, by way of reply, their defense to the enforcement of such an unreasonable limitation on the value of their horses.

As Appellant saw fit to go to trial without raising such an issue, it is now certainly too late to open up that subject, and it is certainly not entitled to have that question adjudged in its favor without having given Appellees an opportunity, under proper pleadings, to bring before the trial court all the evidence bearing upon such issues.

Appellant certainly cannot ask that Appellees be cut off without having had the privilege of a hearing and trial, and it is equally certain that it is now too late to ask this Appellate Court to reverse this judgement for the purpose of giving Appellant an opportunity to make such defense, when Appellant, if it had such a defense,
625 (which we deny), not only did not attempt to make such defense at the proper time, but did not even tender or offer by amended answer to make such defense, or show any reason why it had not made such defense, in its motion and grounds for a new trial; and, in its motion and grounds for a new trial, did not ask the court to set aside the judgment to enable it to make such defense, and surely it is too late to do so in this Appellate Court.

Notwithstanding the failure of Appellant, in its answer, to make such defense, and thereby give Appellees an opportunity to reply, and to introduce evidence on the subject, Appellant is here insisting on the court drawing conclusions favorable to Appellant from vague expressions in its printed bill of lading. Appellant would have us believe that the word "established" and words "reduced rate" fully take place of the allegations in the answer in the Croninger case:

Second. "That in obedience to that act it had duly filed with the Inter-State Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia;

Third. "That its schedule showed that its rates and charges, when the value of the property to be carried was in excess of fifty dollars, were graduated reasonably, according to the value;

Fourth. "That the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars;

Fifth. "That the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment;

Sixth. "That it (the defendant) required that the value should be declared by the shipper;

Seventh. "That if he did not disclose and declare the value
626 when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of fifty dollars;

Eighth. "That the package so delivered was sealed;

Ninth. "That the defendant did not know the contents or value;

Tenth. "That if it had it would not have received it for carriage for less than the lawful published rate of fifty-five cents."

Appellant would have us accept the inferences which it draws from the printed bill of lading with the same force as if properly plead by it in its answer, and without giving Appellees any opportunity to reply thereto or to be heard by evidence or otherwise, on the trial of the issues so made.

Whatever inferences Appellant seeks to draw in its favor from this printed bill of lading, in support of this attempted defense, are all swallowed up and annihilated by one tremendous, indisputable and overwhelming fact appearing in this record that, notwithstanding this printed bill of lading, and in the teeth of this now attempted inference, the Appellant, at the conclusion of the trial, asked a written instruction requesting the court to direct the jury to find the full market value of the horses.

And one of the Appellant's grounds for a new trial was the failure of the court to give this instruction.

This fact wipes out all inferences, contra, to be drawn from the printed bill of lading, and all pretenses to such a defense.

The second section of the Appellant's last brief is devoted to establishing its right to appeal to the Federal Court by reason of
627 having filed a supplemental brief raising a federal question.

Suppose Appellant has such right of appeal, what good would it do Appellant? We already have the views of the Supreme Court on the subject outlined in the above case of Adams Express Company vs. Croninger. In case of such an appeal will not the Supreme Court say to Appellant, "you have not made any of the ten allegations recited in that case as constituting a defense; you gave Appellees no opportunity to make an issue or defense as to any of those ten essential allegations; you, in fact, did not tender any defense at all on this subject;" and would not the Supreme Court further say to Appellant, in reference to this particular case, "you on the contrary requested the trial court to instruct the jury to find the full market value of the horses, thereby conceding that you had no agreement limiting the value of the horses to the nominal sum of one hundred dollars each."

But Appellant's discussion as to its right of appeal to the Federal Court, based upon it filing its supplemental brief herein raising the federal question, is entirely premature, because such right may depend upon the judgment herein.

If this Honorable Court shall hold that, under the practice of this State, the Appellant, in filing its answer and setting up its defenses, should have made this defense;

or if this Honorable Court shall hold that, under the practice and procedure in this State, Appellant, after offering an instruction to the jury to find the full market value of the horses, cannot complain of the judgment finding the market value, instead of the nominal value, of the horses;

or if this Honorable Court shall hold that, this being an appel-

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late court only, it can only reverse a judgment of the *the*
628 trial court for errors in that court excepted to by the party complaining, and as no such defense was tendered in the trial court, and rejected by the trial court, and excepted to by Appellant, and as no mention thereof is found in the motion and grounds for a new trial, and as, in the motion and grounds for a new trial, the Appellant complains, not of any alleged refusal of the lower court to limit the recovery of the horses to one hundred dollars each, but on the other hand complains that the court did not give the instruction offered by the Appellant, to find the full market value of the horses, and as our rules of practice and decisions thereon hold that no errors occurring at the trial shall be considered unless contained in the motion and grounds for a new trial;

[see McLain vs. Dibble, 13 Bush, 298;
Hatfield vs. Adams, 123 Ky., 428;
Acme Mills Co. vs. Rives, 141 Ky., 430]

then, and in any of the events mentioned, the Federal Court will refuse to take jurisdiction of an appeal, notwithstanding the many authorities referred to by Appellant, because, as we understand it, and according to the many decisions to which we will presently refer, the Federal Court will not interfere with matters which pertain to state procedure and state rules and practice. In other words, the Federal Court will not take jurisdiction of a case in the state courts if the federal question has not, under the rules of procedure and practice in that state, been presented in proper time and in the proper manner, or if, under the rules of procedure and practice in
629 that state, such defense has been waived, or if the party, by his conduct, is estopped to make the question.

In the Federal Statutes Annotated, we note the following:

"The right, title, privilege, or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way."

Mutual L. Ins. Co. vs. McGrew, (1903) 188 U. S. 292;
Sayward vs. Denny, (1895) 158 U. S. 180;
Morrison vs. Watson, (1894) 154 U. S. 111;
Miller vs. Texas, (1894) 153 U. S. 535;
Maxwell vs. Newbold, (1855) 18 How. U. S. 515;
Hoyt vs. Shelden, (1861) 1 Black U. S. 518.

"The proper time is in the trial court, whenever that is required by the state practice in accordance with which the highest court of a state will not revise the judgment of the court below, on questions not therein raised."

Spies vs. Illinois, (1887) 123 U. S. 131;
Jacobi vs. Alabama, (1902) 187 U. S. 133;
Layton vs. Missouri, (1902) 187 U. S. 356;
Erie R. Co. vs. Purdy, (1902) 185 U. S. 148;
Mutual L. Ins. Co. vs. McGrew, (1903) 188 U. S. 308;
Baldwin vs. Kansas, (1889) 129 U. S. 52.

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May not this Honorable Court say, that, being an Appellate Court only, the practice in this State requires that this alleged defense should have been presented by answer in the lower court, and Appellees given an opportunity to reply thereto, and the lower court should have passed on it, and if it had refused to entertain such defense, the Appellant must have excepted to the ruling of the lower court, before this Honorable Court could reverse a judgment of the trial court?

May not this Honorable Court say that, under the practice
630 in this State, it cannot reverse the judgment of the trial court in this case, because the Appellant did not ask an instruction to limit the recovery for the horses to the nominal value of one hundred dollars each, and except to the ruling of the lower court thereon, but on the contrary, asked the court to instruct the jury to find the full market value of the horses, and under the rules of practice in this State, cannot complain of the judgment based on the same, or in substance the same, instruction?

"In Rutland R. R. Co. vs. Central Vermont R. Co., (1895) 159 U. S. 630, it is stated, "that where a State court in rendering judgment decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to support the judgment this court will dismiss the writ of error without considering the federal question." To the same effect are:

Cap. N. Bank vs. Cadiz F. N. Bank, (1899) 172 U. S. 425;
Harrison vs. Morton, (1898) 171 U. S. 38;
Pierce vs. Somerset R. R. Co. (1898) 171 U. S. 641;
Wade vs. Lawder, (1897) 165 U. S. 624;
Bacon vs. Texas, (1896) 163 U. S. 207 (and many other cases).

"The decision of a Supreme Court of a state on the second appeal in the case that it will not re-open the question involved upon the first hearing to let in a federal defense presented by new pleas filed after the case was sent down for a new trial, merely settles the question of practice and does not present a federal question."
Yazoo, etc., R. Co. vs. Adams, (1901) 180 U. S. 8;

"Estoppel.—A decision of a state court based upon an estoppel does not present a federal question."
Gillis vs. Stanchfield, (1895) 159 U. S. 658;
Michigan vs. Flint, etc., R. Co. (1894) 152 U. S. 363;
631 Adams County vs. Burlington, etc., R. R. Co. (1884) 112 U. S. 123.
Israel vs. Arthur, (1894) 152 U. S. 355;
Sherman vs. Grinnell, (1892) 154 U. S. 198;
Beals vs. Cone, (1903) 188 U. S. 186;
Speed vs. McCarthy, (1901) 181 U. S. 269.

May not this Honorable Court hold that Appellant is estopped to raise the federal question in this Court after moving the trial court

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to instruct the jury to find the full market value of the horses, contrary to the alleged agreement of one hundred dollars each?

"Waiver.—Where the case is disposed of on the ground of a waiver no federal question is presented."

Beaupre vs. Noyes, (1891) 138 U. S. 397;
Eustis vs. Bolles, (1893) 150 U. S. 361.

May not this Honorable Court say that, under the rules of practice and procedure in this State, the Appellant, by its failure to present such defense to the trial court, giving Appellees an opportunity to make an issue thereon, and by its motion in the trial court, to instruct the jury to find the full market value of the horses, waived its right to present such defense?

"State Procedure.—A decision of a state court resting on the grounds of state procedure does not present a federal question."

Tripp vs. Santa Rosa St. R. Co. (1892) 144 U. S. 126;
Iowa Cent. R. Co. vs. Iowa, (1896) 160 U. S. 389;
Grand Rapids, etc. R. Co. vs. Butler, (1895) 159 U. S. 87;
Wood vs. Brady, (1893) 150 U. S. 18;
Gibson vs. Mississippi (1896) 162 U. S. 565 (and many other cases).

632 We also note in the 1912 supplement to the Federal Statutes Annotated the following:

"The decision of a state court sustaining its jurisdiction of a suit against a foreign railway corporation, commenced by attaching a box car belonging to that company, does not involve a ruling upon the company's contention that the levy upon such car was invalid, as burdening inter-state commerce, where the court did not pass upon the question whether the levy of the attachment was regular, or whether the property seized was subject to levy, but held, construing the state statutes relating to attachments and the decisions of the highest court of that state, that it was unnecessary to decide those questions, because they had been waived by the conduct of the railway company in giving a replevy bond and answering without protestation."

Cincinnati, etc., R. Co. vs. Slade, (1910) 216 U. S. 78; 30 S. Ct. 230, 54 U. S. (L. ed.) 390.

"A decision of a state court in an action founded on a statute of another state creating an action for death, qualified by one year's limitation, that the failure to plead the statute in the complaint was cured by its inclusion in the answers, filed more than one year after the death, presents no question as to the full faith and credit to be given such statute, so as to sustain a writ of error under section 709, but involves nothing more than a question of local pleading and practice."

Texas etc. R. Co. vs. Miller, (1911) 221 U. S. 408, 31 S. Ct. 534, 55 U. S. (L. ed.) 789;
Texas etc. R. Co. vs. Gross, (1911) 221 U. S. 417, 31 S. Ct. 536, 55 U. S. (L. ed) 796.

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"A federal question, although referred to in the assignments of error in the state appellate court and in the federal Supreme Court, cannot be considered by the latter where it does not appear
633 that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court."

Cox vs. Texas, (1906) 202 U. S. 446, 26 S. Ct. 671, 50 U. S. (L. ed.) 1099.

"The Federal Supreme Court has no jurisdiction to review a judgment of a state court involving a question of estopp*le* or quasi-estopp*le* broad enough to support the judgment without reference to any federal question. Leonard vs. Vicksburg, etc. R. Co. (1905) 198 U. S. 416, 25 S. Ct. 750, 49 U. S. (L. ed.) 1108, holding that a decision of a state court that defendants in ejectment, who had successfully insisted in a prior suit in a federal court that only a portion of a tract of land was in issue, cannot invoke the rule that a judgment determining the ownership of a portion of a tract is conclusive between the same parties, claiming under the same titles, as to the ownership of the entire tract, is not reviewable as denying any federal rights asserted under the federal court's judgment; as the state court merely 'applied the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings.'"

May not this Honorable Court very properly hold that the Appellant having, in the trial court, made no defense on this subject, and having, on the contrary, moved the trial court to instruct the jury to find the full market value of the horses, cannot in this Appellate Court, take the wholly inconsistent position of contending for a limitation of one hundred dollars each on the horses?

"Whether railway companies waive their rights to change the line of narrow-gauge road, and are estopped to revoke such waiver, by obtaining the consent of the state, through its railroad commission, to broaden and standardize that line through its entire length, is a local, and not a federal question, and cannot be reviewed by
634 the Federal Supreme Court."

Mobile, etc. R. Co. vs. Mississippi, (1908) 210 U. S. 187, 28 S. Ct. 650, 52 U. S. (L. ed.) 1016.

So we contend that Appellant is not only premature in raising this question, but it must await the judgment of this Court before it can be certain of its right to appeal, because if this Court, as we think it must, shall hold that the federal question was not raised at the proper time and in the proper manner to be a ground for a reversal of the judgment of the trial court, or if it shall hold that such defense has been waived, and that Appellant is not in position now to make such defense in this Appellate Court, then, and in any of these instances, the federal cases referred to by Appellant will be unimportant on the subject of Appellant's right to appeal.

In the concluding part of Appellant's last brief it is contended that this question was presented in the trial court. We want to take issue with Appellant as to this, and show that this question

was not brought up at all in the trial court. The only reference to any federal question in the record in the trial court is in the order of February 3rd, 1912:

"Thereupon the court heard argument by counsel for plaintiffs and defendant respectively upon the motion and grounds for a new trial of this cause filed herein by the defendant, Louisville Railroad Company; and also heard said counsel upon the federal question raised by the defendant as to whether the contract in question for the transportation of said colts and fillies mentioned in the petition from Lexington, Kentucky to Juarez, in the Republic of Mexico, was in violation of the provisions or any of them of an Act
635 of Congress of the United States entitled an Act to regulate commerce, approved February 4th, 1887, as amended by an Act approved March 2, 1889, by an Act approved February 10, 1891, by an Act approved February 8, 1895, by an Act approved June 29th, 1906, by a joint resolution approved June 30, 1906, by an Act approved February 25, 1909, and by an Act approved June 8, 1910; and having considered the said motion and grounds for a new trial of this cause, and having also considered the said federal question and being of the opinion that said contract did not and does not violate any of the provisions of said act of Congress, the motion is hereby overruled and a new trial is refused."

The above quoted order is all there is in the record in the trial court on this subject, and this subject was introduced not by any pleading or written motion but long after all the grounds for new trial had been filed and merely in oral argument.

It will be seen from the above recital from the order book of the trial court that Appellant was insisting that the contract, or bill of lading, was in conflict with the provisions of the acts of Congress with reference to inter-state commerce and therefore not binding.

Appellant now contends it had reference to the present question of limitation of value to one hundred dollars each for the horses; this record shows conclusively the contrary and that Appellant was then contending that that limitation was illegal and void, not that it was legal and binding.

So to sum up this part of the discussion, Appellant was either talking about some other feature of the contract, or Appellant was contending in the lower court that the attempted limitation of one hundred dollars each for the horses was in conflict with the
636 provisions of the act of Congress, and illegal and void!

It is therefore easy to be seen that Appellant was not making this present question at all, but Appellant was obviously contending that the vague reference in the printed bill of lading to a low freight rate violated the law as to fixed and uniform freight rates, which contention, the lower court could not uphold, because there was nothing in the pleadings or evidence to show that this freight rate was any less than the regular freight rate.

But going back to the subject, either Appellant did not raise this present question in the lower court at all, or if Appellant did raise the question, Appellant insisted that the limitation of one hundred

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dollars each for the horses was not binding, with which we thoroughly agree.

But aside from all this, if the record of the lower court showed the contrary, and if it showed that the Appellant did, on February 3rd, 1912, raise this same question in the trial court, it certainly came too late, because the trial ended December 23rd and the motion and grounds for a new trial, and the amended grounds, were filed long prior to February 3rd, 1912, and no mention of this subject is found in any of the grounds, or amended grounds, for a new trial.

Appellant had had its day in court. It was then too late to present such question to the trial court, especially after moving the trial court to instruct the jury to find the full market value of the horses.

We therefore contend that this question was never presented or referred to, in any form, in the lower court, either before,
637 or after trial, and this Appellate Court, which only reviews the errors of the lower court, under the procedure and practice of this State, cannot afford Appellant any relief on this recently discovered and utterly inconsistent defense.

An affirmance is respectfully asked.

ROBT. B. FRANKLIN,
ROBT. C. TALBOTT,
Attorneys for Appellees.

638 Afterwards at a Court of Appeals held as aforesaid on the 28th of March, 1913, the following orders were entered herein, to-wit:—

L. & N. R. R. Co.
vs.
WOODFORD, &c.

Fayette.

The court being sufficiently advised delivered a response, and it is ordered that the petition for rehearing be and the same is now overruled.

It appearing that the appellant desires to prosecute an appeal to the Supreme Court of the United States it is ordered that the mandate herein be not issued for ten days.

The following is a copy of the Response of the Court filed by the foregoing order:

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639 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
CATESBY WOODFORD, &C., Appellees.

Appeal from Fayette Circuit Court.

Response to Petition for Rehearing by Chief Justice Hobson.

We agree with counsel for appellant that the State courts must take judicial notice of acts of Congress no less than acts of the State Legislature; and that it is not essential that the federal question should have been raised in any special form in the trial court, but it is essential that the facts on which the federal question rests must be presented in the record. The defense which the defendant now relies on does not arise under the act of Congress; it arises under a written contract, and the provisions of this written contract
640 were not pleaded. The bill of lading was not filed with the petition; it was filed in the action after the answer was filed in response to a rule, and is not a part of the pleadings. The bill of lading contains a number of clauses limiting and restricting the defendant's liability in certain contingencies. If the defendant desired to rely upon any of these clauses limiting its liability, it was incumbent upon it to plead the clause in its answer. It was not incumbent upon the plaintiff to anticipate and negative all the exceptions set out in the separate clauses of the contract. Aetna Life Ins. Co. v. Rustin, 151 Ky. 108.) The defendant did not set out in its answer or in any pleading any of the conditions of the contract, and not having pleaded the provisions of the contract, they were not before the trial court, and are not before this court. The provisions of the contract not having been pleaded, no federal question is presented, as to the validity of the contract. It is true that on the motion for new trial, the federal question was suggested in argument, but the trial was then over. It was too late to file an amended answer. (Meadows v. Goff, 90 Ky. 540; Brown v. Van Cleave, 86 Ky. 381), and by section 386 of the Code, it was the duty of the court to enter judgment for the party whom the pleadings entitled thereto. The defendant having failed to plead the provisions of the written contract relied on, there was nothing which the court could consider to sustain the federal question suggested on the argument of the motion for new
641 new trial. The matter not having been presented in the circuit court in such a manner that it could be considered in that court, and the case having been tried in that court without reference to any of the special provisions of the contract, the defense now suggested is not maintainable in this court. The defendant not only failed to plead the provisions of the contract now relied on; but asked on the trial an instruction inconsistent with the view now presented, and practiced its case throughout the trial on this basis.

If section 196 of the State Constitution were not in force and if

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contracts limiting the common law liability of carriers were upheld and enforced in this State, would it be maintained that the defendant in this action would be entitled to the benefit of the stipulation in the contract limiting its liability without pleading the contract or setting up this defense? And if this is true how can it be maintained that the defendant is in a better position because it relies on an act of Congress than it would be if the same defense had been allowed by the State law, and had not been pleaded or relied on in the trial? To grant a new trial for a matter not pleaded, and not relied on in the trial, would be to set a precedent making litigation interminable, which cannot be justified under the well settled rules of legal procedure.

Petition overruled.

R. A. Thornton, Lexington, Ky.; Benjamin D. Warfield, Louisville, Ky.; Chas. H. Moorman, Louisville, Ky., for Appellant.

Robt. B. Franklin, Frankfort, & Robt. C. Talbott, Lexington, Ky., for Appellee.

[Endorsed:] M'ch 28/13. L. & N. R. Co. v. Catesby Woodford.

642 Afterwards, to-wit, on the 5th day of April, 1913, the appellant, Louisville & Nashville Railroad Company, filed in the office of the Clerk of the Court of Appeals of Kentucky its Petition for Writ of Error together with the order of the Chief Justice of said Court allowing said writ, which petition and order are attached hereto as part of this record.

643 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Petition for Writ of Error.

To the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky:

The Louisville & Nashville & *Nashville* Railroad Company, appellant in the above-entitled case in the Court of Appeals of Kentucky, hereby petitions for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of Kentucky in order that the judgment of the Court of Appeals in that case may be re-examined by the Supreme Court of the United States, and reversed if found to be erroneous: The grounds of this application are:

(1) That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that the limited-valuation clause in the contract under which the horses involved in said case were shipped was available by it as a defense to that portion of the claim of the

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defendants in error in excess of the valuation fixed in said provision, notwithstanding said contract was not specially pleaded by the plaintiff in error in the Circuit Court of Fayette County, Kentucky.

(2) That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that the contract under which the horses involved in said case were to be transported from Lexington, Kentucky, to Jaurez, Mexico, fixed the value of said horses at $100 for the purpose of transportation between said points, and that as the rate of charges for the transportation of said horses between said points was made in consideration of the value so fixed, the defendants in error were not entitled to recover in excess of $100 for each horse damaged or lost.

644 (3) That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that under the Act of Congress entitled "An Act to Regulate Commerce," of 1887, as amended by the Act of Congress of June 29, 1906, as applied to the contract for the transportation of the horses involved in said action, the defendants in error were limited, in their recovery for loss or damage to said horses, to the sum of $100 for each horse.

(4) That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that the defendants in error and the plaintiff in error signed a written contract for the transportation of said shipment of horses, and under said contract the defendants in error elected to avail themselves of a reduced rate, and, in consideration of said reduced rate, fixed the value of said horses shipped under said contract at $100, as the maximum amount to be collected by the defendants in error in the event of injury to or loss of said horses, and that under the Act of Congress of 1887, as subsequently amended, and particularly as amended by the Act of June 29, 1906, the defendants in error were not entitled to recover in excess of said sum for each horse damaged or lost.

(5) That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that the judgment of the Court of Appeals is repugnant to the Act of Congress of 1887, entitled "An Act to Regulate Commerce," as amended by the Act of Congress of June 29, 1906, in that it permits a shipper to make a contract for a lower rate, based upon a reduced valuation, than the rate applicable to the full value, and then permits a recovery for the full value of the shipment under said lower-rate contract, in the event of loss or damage.

(6) That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that the necessary force and effect of the judgment is to deny to the Congress of the United States the right to regulate commerce among the States, and in that respect the judgment violates Subsection 3, Section 8, Article I, of the Constitution of the United States.

645 And the said Louisville & Nashville Railroad Company further petition that upon the allowance of said writ of error, and the execution of a supersedeas bond to be approved by your Honor, that the mandate of this court be suspended, and that no execution be issued for the satisfaction of said judgment, pending

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the argument and decision of this case in the Supreme Court of the United States.

R. A. THORNTON,
BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
Counsel for Louisville & Nashville Railroad Company.

Filed April 5, 1913.
J. P. HOBSON,
Chief Justice, Court of Appeals of Kentucky.

Filed Apr. 5, 1913. Robt. L. Greene, Clerk Court of Appeals.

646 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

The above-entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

J. P. HOBSON,
Chief Justice, Court of Appeals of Kentucky.

Filed Apr. 5, 1913. Robt. L. Greene, Clerk Court of Appeals.

647 At the same time, to-wit, on April 5, 1913, said appellant filed in said Clerk's office a Writ of Error, which is returned herewith as part hereof.

648 UNITED STATES OF AMERICA,
Eastern District of Kentucky,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky, before you or some of you, between the Louisville & Nashville Railroad Company, appellant, against Catesby Woodford and John T. Ireland, appellees, a manifest error hath happened, to the great damage of said Louisville & Nashville Railroad Company, as

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by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the May 3rd next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 5 day of April, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States, of America, the one hundred and thirty-seventh.

[Seal United States of America, Eastern K't'y Dist. Court.]

JOHN W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky, at Frankfort,
By CHAS. N. WIARD, *Deputy Clerk.*

Allowed April 5, 1913.
By J. P. HOBSON,
Chief Justice, Court of Appeals of Kentucky.

Filed Apr. 5, 1913. Robt. L. Greene, Clerk Court of Appeals.

649 At the same time, to-wit, on April 5, 1913, said appellant and plaintiff in error filed in said Clerk's office his Writ of Error Bond, which Bond together with the Power of Attorney and financial Statement of the Surety is copied herein and made part hereof in words and figures following, to-wit:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Writ of Error Bond.

Know all men by these presents, that we, the Louisville & Nashville Railroad Company, as principal, and Citizens' Trust & Guaranty Co. of W. Va., as surety, are held and firmly bound unto Catesby Woodford and John T. Ireland in the sum of Twenty-five Thousand Dollars to be paid to the said Catesby Woodford and John T. Ireland. To the payment of which well and truly to be made, we bind ourselves, and each of us jointly and severally, and our, and each of our heirs, executors and administrators, firmly by these presents.

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Sealed with our seals, and dated this 3rd day of April, A. D. 1913.

Whereas the above-named plaintiff in error, the Louisville & Nashville Railroad Company, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky, the highest court in said State.

650 Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error, Louisville & Nashville Railroad Company, shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By W. L. MAPOTHER, *First Vice-President.*
CITIZENS' TRUST & GUARANTY CO. OF W. VA., *Surety,* [SEAL.]
By J. F. GAUVREAU, *Attorney in Fact.*

Approved by and sealed and delivered in the presence of
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

Filed Apr. 5, 1913. Rob't L. Greene, Clerk Court of Appeals.

At a special meeting of the Board of Directors of Citizens Trust & Guaranty Company of West Virginia, held at the office of the Company in Parkersburg, West Virginia, on the 29th day of June, 1908, the following resolutions were unanimously adopted, to-wit:

Whereas, the Citizens Trust & Guaranty Company of West Virginia has been duly authorized by the State of Kentucky to transact a surety business therein, and

Whereas, it is often necessary in order to facilitate the business of the Company, in said state, to have bonds in certain cases executed upon application for same, thereupon be it

"Resolved, that J. F. Gauvreau of Louisville, County of
651 Jefferson, State of Kentucky, be and he is hereby authorized to execute and deliver for and on behalf of the said Citizens Trust & Guaranty Company of West Virginia, all bonds required in judicial proceedings in any and all courts in said State of Kentucky, and in the United States Circuit and District Courts in said State, bonds for Executors, Administrators, Trustees, Receivers, Special Commissioners, Assignees, Guardians, Committees for Lunatics, in Replevin Cases, Attachment Cases, Injunction Cases, Appeal Cases, bonds for Security for Costs, and any and all other bonds required to be given by order, or decree of any Court of Law or Equity, of the State of Kentucky, or the United States Circuit and District Courts for said State, bonds running to the Treasury Department to be approved by the Treasury Department or by Collectors of Internal Revenue in the State of Kentucky, or by the Commissioner of Inter-

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nal Revenue, and bonds in Bankruptcy Proceedings; also any proposal or bid bond; also any bond guaranteeing the performance of a contract in any case where he, the said J. F. Gauvreau, can produce a letter or telegram from the Home Office of Citizens Trust & Guaranty Company of West Virginia, or its President, authorizing the execution of such bond, and to affix the seal of said Company to any undertaking or bond so executed. And any such bond, so executed shall be binding upon the said Citizens Trust & Guaranty Company of West Virginia, to all intents and purposes, as fully as if done by the regular officers of the Company in their own proper persons in its behalf."

We, J. H. Knapp, Vice-President, and Noah Lane, Assistant Secretary of Citizens Trust & Guaranty Company of West Virginia, hereby certify that the foregoing is a true copy taken from the records of proceedings of the Board of Directors of Citizens Trust & Guaranty Company of West Virginia.

652 In testimony whereof, we have hereunto subscribed our names as Vice-President and Assistant Secretary, respectively, and affixed the corporate seal of the Citizens Trust & Guaranty Company of West Virginia, this 15th day of January, 1913.

[SEAL.] J. H. KNAPP,
Vice-President.
NOAH LANE,
Assistant Secretary.

STATE OF WEST VIRGINIA,
County of Wood, ss:

On this 15th day of January, 1913, before the subscriber, a Notary Public of the State of West Virginia, in and for the County of Wood, duly commissioned and qualified came J. H. Knapp, Vice-President, and Noah Lane, Assistant Secretary, of Citizens Trust & Guaranty Company of West Virginia, to me personally known to be the individuals and officers described in and who executed the preceding instrument and they each acknowledge the execution of the same, and being by me duly sworn severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said Company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the City of Frankfort, the day and year first above written.

[SEAL.] J. L. KNAPP,
Notary Public.

My commission expires August 29, 1917.

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653 *Financial Statement of the Citizens Trust & Guaranty Company of West Virginia, as of December 31, 1912.*

Company Began Business July 31, 1899.

Assets.

Real Estate Home Office	$49,000.00
Real Estate Other Than Home Office	28,216.96
Furniture and Fixtures	450.00
Railroad and Other Bonds	401,070.00
Bank Stocks	29,500.00
Other Stocks	27,000.00
Cash in Banks and Home Office	33,524.49
Premiums Due for Bonds Written	32,539.13
Loans on Mortgages	15,329.00
Time Loans	1,040.10
Other Assets	21,491.73
	$369,161.41

Liabilities.

Capital Stock Paid in Cash	$400,000.00
Surplus	100,000.00
Undivided Profits	25,965.04
Reserve for Unearned Premiums	50,000.00
Reserve for Possible Losses	53,250.00
Reserve for Incidental Expenses, Bills not Received	850.00
Accounts Payable	1,096.37
Dividend No. 31	8,000.00
	$369,161.41

654 *Dividends.*

Date of last declaration, December, 1912.
Date payable, January 1, 1913.
Amount, $8,000.00.
Total dividends paid to date $247,000.00.

We, R. J. A. Boreman, Vice President, and J. H. Knapp, Secretary, of the Citizens Trust & Guaranty Company of West Virginia, certify under oath that the above statement is true and correct.

R. J. A. BOREMAN,
Vice-President.
J. H. KNAPP, *Secretary.*

Subscribed and Sworn to before me this 2nd day of January, 1913.

[SEAL.] J. L. KNAPP,
Notary Public in and for Wood County, West Virginia.

My Commission expires August 29, 1917.

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At the same time, to-wit, on April 5, 1913, the plaintiff in error, Louisville & Nashville Railroad Company, filed in the office of the Clerk of said Court its Assignment of Errors and Prayer for Reversal in words and figures following, to-wit:

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
v.
CATESBY WOODFORD and JOHN T. IRELAND, Defendants in Error.

Assignment of Errors and Prayer for Reversal.

The plaintiff in error, the Louisville & Nashville Railroad Company, assigns the following errors in the judgment of the
655 Court of Appeals of Kentucky herein, namely:

(1) The court erred in holding that the limited-valuation clause in the contract under which the horses involved in this action were shipped, not being specially pleaded by the plaintiff in error, was not available as a defense to that portion of the claim of the defendants in error in excess of the values fixed in said provision.

(2) The court erred in holding that the contract of shipment under which the horses involved in this action were transported—which contract fixed the value of said horses at $100 apiece for the purposes of transportation at the reduced rate charged the defendants in error, which rate was made in consideration of said valuation—was not available as a defense of the plaintiff in error against claims for damages in excess of $100 on each horse.

(3) The court erred in holding that the defense on which the plaintiff in error relied did not arise under the Act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, but that it arose under the written contract for the transportation of the horses involved in this action, from Lexington, Kentucky, to Jaurez, Mexico, and that, as said written contract was not specially pleaded, the plaintiff in error could not rely upon the aforesaid acts of Congress applicable to the provisions of said contract.

(4) The damages recovered in this action were for injuries to horses which the plaintiff in error received at Lexington, Kentucky, to be transported to Jaurez, Mexico. The owners of the horses and the plaintiff in error signed a written contract for the transportation of said shipment. In said contract the defendants in error elected to avail themselves of a reduced rate, and in consideration of
656 said reduced rate fixed the value of said horses shipped under said contract at $100 each, as the maximum amount to be collected by the defendants in error in the event of injury to or loss of said horses. The court erred in holding that because the plaintiff in error did not specially plead the contract, it could not avail itself of the provisions thereof, under the Interstate Commerce Act of 1887, as subsequently amended, and particularly as amended by the Act of June 29, 1906.

(5) The court erred in denying to the plaintiff in error the rights

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and privileges claimed by it under the Act of Congress entitled "An Act to Regulate Commerce," of 1887, as amended by the Act of Congress of June 29, 1906, which act was applicable to the transportation of the horses involved in this action, and under which acts the defendants in error were not entitled to recover a judgment for a greater sum than $100 for each horse damaged or lost.

(6) The judgment of the court is repugnant to the Act of Congress of 1887, entitled "An Act To Regulate Commerce," as amended by the Act of Congress of June 29, 1906, in that it permits a shipper to make a contract for a lower rate, based upon a reduced valuation, than the rate applicable to the full value, and then permits a recovery for the full value of the shipment under said lower-rate contract, in the event of loss or damage.

(7) The necessary force and effect of the judgment is to deny to the Congress of the United States the right to regulate commerce among the States, and in that respect the judgment violates subsection 3, section 8, Article 1, of the Constitution of the United States.

Therefore, the plaintiff in error prays that the judgment of the Court of Appeals of Kentucky—it being the court of last resort of said State—may be reversed by this Honorable Court and
657 this cause remanded to said Court of Appeals of Kentucky with directions to send down its mandate to the Fayette Circuit Court, directing it to dismiss the petition against the plaintiff in error.

R. A. THORNTON,
BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
Counsel for Plaintiff in Error.

Filed Apr. 15, 1913. Rob't L. Greene, Clerk Court of Appeals.

At the same time, to-wit, on April 5, 1913, the plaintiff in error, Louisville & Nashville Railroad Company, filed in the Clerk's office of said Court its Original Citation with proof of service thereon, which is attached hereto as part hereof:

658 UNITED STATES OF AMERICA,
District of Kentucky, Sixth Judicial Circuit, ss:

To Catesby Woodford and John T. Ireland, Greeting:

You are cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, in District of Columbia, on the 3rd day of May, 1913, next, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of Kentucky, wherein the Louisville & Nashville Railroad Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Su-

preme Court of the United States, this April 5 in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America, the one hundred and thirty-seventh.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Service of Citation accepted April 5th, 1913.

FRANKLIN & TALBOTT,
Attorneys for Catesby Woodford and John T. Ireland.

659 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States a complete transcript of the entire record with all things touching the same in the case of Louisville & Nashville Railroad Company, Appellant and Plaintiff in Error, vs. Catesby Woodford and John T. Ireland, Appellees and Defendants in Error, as the same appears from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed my official seal.

Done at the Capitol at Frankfort, Kentucky, on this the 22d day of April, A. D. 1913.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this Transcript $201.40.

Endorsed on cover: File No. 23,660. Kentucky Court of Appeals. Term No. 531. The Louisville & Nashville Railroad Company, plaintiff in error, vs. Catesby Woodford and John T. Ireland. Filed April 28th, 1913. File No. 23,660.

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JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 531.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

versus

CATESBY WOODFORD AND JOHN T. IRELAND, - - - Defendants in Error.

Plaintiff in Error's Objection to Motion of Defendants in Error to Dismiss for Want of Jurisdiction and Brief in Support of Said Objection.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY LANE STONE,
ROBERT A. THORNTON,
CHARLES H. MOORMAN,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Points Discussed and Authorities Cited.

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I. By operation of law, the Carmack Amendment to the Interstate Commerce Act was written into the live-stock contract under which the shipment of horses sued on in this case was made, and said amendment repealed Section 196, Ky. Const., as to such shipment 3

Adams Exp. Co. v. Croninger, 226 U. S. 491. 3
Adams Exp. Co. v. Walker, 119 Ky. 121.... 3
C. B. & Q. R'y Co. v. Miller, 226 U. S. 513... 3
C. M. & St. P. R'y Co. v. Solan, 169 U. S. 133, 4
C. N. O. & T. P. R'y Co. v. Dodd, 153 Ky. 845, 5
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M. K. & T. R'y Co. v. Harriman, *Id.* 657.... 3
P. R. Co. v. Hughes, 191 U. S. 477..... 4
Southern Ex. Co. v. Fox & Logan, 131 Ky. 257 3

II. The Court of Appeals of Kentucky erred in holding that the live-stock contract was not pleaded; in refusing to apply the Carmack Amendment; and in holding that the Kentucky law applied in the absence of express reliance upon the Federal law in plaintiff in error's pleadings.

Adams Exp. Co. v. Croninger, 226 U. S. 491. 17
M. C. R. Co. v. Vreeland, 227 U. S. 59..... 21
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St. L. & S. F. R'y Co. v. Seale, 229 U. S. 156. 20
Wells, Fargo Co. v. Neiman-Marcus Co., 227 U. S. 469 16

III. This case does not fall under the third clause, but under the second clause, of Section 709, Revised Statutes of the United States.

Chapman v. Goodnow, 123 U. S. 540, 548... 34
Columbia Water Co. v. C. E. St. R'y Co., 172 U. S. 475, 488 32
Erie R. Co. v. Purdy, 185 U. S. on p. 153.... 35
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McCulloch v. Maryland, 4 Wheat. 316 30
Second Employers' Liability Cases, 223 U. S. 1, 53, 54 30
Y. & M. V. R. Co. v. Adams, 180 U. S. 1 28

IV. There was no intentional relinquishment by plaintiff in error of a known right; therefore, there was no waiver amounting to an estoppel.

29 Amer. & Eng. Encyc. Law (2d Ed.), 1091, 1095 37
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Christianson v. Carleton, 69 Vermont, 91, 37 Atl. 226 37
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SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 531.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Plaintiff in Error,*

vs.

CATESBY WOODFORD AND JOHN T. IRELAND, - - - - - - *Defendants in Error.*

PLAINTIFF IN ERROR'S OBJECTION TO THE MOTION OF DEFENDANTS IN ERROR TO DISMISS FOR WANT OF JURISDICTION, AND BRIEF IN SUPPORT OF SAID OBJECTION.

Comes plaintiff in error, Louisville & Nashville Railroad Company, and files its objection to the motion which it is advised the defendants in error will make in this

We have not received a copy of the printed record in this court in this case, and our latest information from the clerk of your court is that we may not expect to receive same for several days. This will be too late for us to examine the record before it is necessary for us to send this brief to the printer, in order that it may be printed and forwarded to Washington by December 15, 1913, when defendants in error have given notice their motion will be made. Therefore, we are not able to refer in our brief to the pages of the printed record, at which will be found the pleadings, live-stock contract and other matters discussed in the brief. This delay is not the fault of the plaintiff in error, but that of the defendants in error, whose duty it was to have the record printed in time for this hearing on their motion.

court on Monday, December 15, 1913, to dismiss plaintiff in error's writ of error in this cause for want of jurisdiction, and, in support of said objection, plaintiff in error files herewith its brief, as follows:

BRIEF.

The questions for decision are:

(1) Was the shipment of horses from Lexington, Kentucky, to Juarez, Mexico, for injuries to which while in plaintiff in error's possession this litigation was instituted, governed by the Act of Congress of February 4, 1887, as several times amended, and particularly as amended by the Act of Congress of June 29, 1906, and more especially by the provision in Section 20 of said last-named Act, commonly known as the Carmack Amendment, or governed by that part of Section 196, Kentucky Constitution, which provides that "No common carrier shall be permitted to contract for relief from its common law liability?"

(2) Did the Court of Appeals of Kentucky err in refusing to apply said Carmack Amendment and in holding that the shipment was governed by the Kentucky law?

(3) Was it the duty of the Kentucky courts to take judicial notice of the Carmack Amendment?

(4) If not, was the Federal question otherwise so raised in the State courts, and is it so presented in this record, as to give this court jurisdiction of this writ of error?

I. BY OPERATION OF LAW, THE CARMACK AMENDMENT WAS WRITTEN INTO THE LIVE-STOCK CONTRACT IN THIS CASE, AND REPEALED SECTION 196, KENTUCKY CONSTITUTION, AS TO SUCH INTERSTATE SHIPMENT.

I.

By said Federal law the released valuation of $100 per head, which it is admitted was contained in the live stock contract on which the shipment was made, was valid, and defendants in error were limited to recovering not exceeding $700 in the aggregate for the seven horses comprising the shipment, three of which died and the other four of which were injured by fire, while in the carrier's custody, instead of the $15,000 which the jury awarded and which the Kentucky courts sustained. (Adams Express Co. v. Croninger, 226 U. S. 491; C. B. & Q. R'y Co. v. Miller, *Id.* 513; C. St. P., etc., R'y Co. v. Latta, *Id.* 519; Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469; Kansas City S. R'y Co. v. Carl, *Id.* 639; M. K. & T. R'y Co. v. Harriman, *Id.* 657.)

But by Section 196, Ky. Const., *supra*, said released valuation was void and of no effect. (Adams Express Co. v. Walker, 119 Ky. 121; Southern Express Co. v. Fox & Logan, 131 Ky. 257; Adams Ex. Co. v. Croninger, 226 U. S. 491, 499.)

Nor had this court, previous to the decision of the Croninger, Miller and Latta cases, *supra*, ever held that a State was without power and authority to promulgate and enforce such a regulation as affecting interstate commerce.

On the contrary, in Pennsylvania R. Co. v. Hughes, 191 U. S. 477, where there was involved a bill of lading in all essential respects identical with that in the case at bar, whereby it was stipulated that in consideration of a reduced freight rate the shipper should be limited to a recovery, in case of negligent loss, of the agreed value declared in said bill of lading, this court held that the public policy of the State declaring void such a bill of lading stipulation, even as to an interstate shipment, was not an interference with interstate commerce, the regulation of which was vested by the Constitution in Congress, inasmuch as that body had not, down to that time, legislated upon the subject, and that the judgment of the Supreme Court of Pennsylvania holding the limited valuation in the bill of lading in that case void, as forbidden by the public policy of that State, was not reviewable by this court.

To the same effect is C. M. & St. P. R'y Co. v. Solan, 169 U. S. 133, where a statute of Iowa very much like Sec. 196, Ky. Const., *supra*, was held to be enforceable as to an interstate shipment.

Therefore, until the decision of the Croninger, Miller and Latta cases, it seemed to be definitely settled by the decisions of the Kentucky Court of Appeals and of this court that Section 196, Ky. Const., rendered void the released valuation in the contract upon which the horses in this case were shipped notwithstanding it was an interstate movement. The question seemed to be so conclusively foreclosed as to make further argument not only useless, but inadmissible.

In fact, in the Croninger case, it is said, referring to the Hughes and Solan cases:

"In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular States."

And the court went on to hold that the Carmack Amendment, *supra*, constituted such subsequent legislation of Congress as to bring about the condition indicated in the latter part of the quotation. But said opinion further manifests that this result was reached only as a result of analyzing and interpreting the amendment as a whole, and not because of any express language used therein.

The shipment which was the basis of this litigation was made long after the Act of Congress containing the Carmack Amendment was enacted. It is not contended on behalf of defendants in error that said amendment was not applicable and controlling as to said shipment, and, if made, such contention would be wholly inadmissible.

The Kentucky Court of Appeals decided the case at bar March 28, 1913. On the following May 22d, the same court decided C. N. O. & T. P. R'y Co. v. Dodd (153 Ky. 845), and upheld the position for which we are contending here, *i. e.*, that by virtue of the Carmack Amendment a shipper of an article in interstate commerce is limited

to recovering the value of such article as fixed in the bill of lading, and that the Carmack Amendment superseded Section 196, Ky. Const., as to such shipments, and that—

"It is not material that no inquiry was made as to the actual value of the animals where the bill of lading which was accepted shows that the charge was based upon a certain valuation; that the knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and the published schedule filed with the commission. The plaintiff in this case testified that he did not read the receipt, and that nothing was said about the value of the animals when they were shipped. But this, under the rulings of the United States Supreme Court, is immaterial. It is the duty of the shipper to inform himself, and when he accepts the lower rate, he takes the benefit with the burden. (See Cincinnati, etc., R. Co. v. Rankin, 153 Ky. 730.)"

And in the Rankin case, *supra* (decided May 14, 1913), the same court applied the same rule as in the Dodd case.

The effect of the decisions of the Kentucky Court of Appeals in the case at bar and in the Rankin and Dodd cases, *supra*, is to limit the recovery in the last two cases to the bill of lading valuation, but to permit defendants in error in the instant case to recover *more than twenty times as much* as the aggregate amount that could be recovered if they were limited to the bill of lading valuation. This results in a glaring discrimination in favor of defendants in error, and against Rankin and Dodd, and brings about the very condition which it was one of the main purposes of the Interstate Commerce Act to prevent.

And that the Kentucky Court of Appeals has changed its attitude towards this question since it decided the case at bar (152 Ky. 298), and overruled our petition for rehearing (153 Ky. 185), is apparent from its opinion in C. N. O. & T. P. R'y Co., *et al.*, v. Goode, 153 Ky. 247, and in the response to the petition for rehearing in that case (155 Ky. 153, 159 S. W. 695).

As will be seen from the original opinion in the case last cited (153 Ky. 247), that case was pleaded and practiced exclusively under Kentucky law. There was no reference to the Federal Employers' Liability Act, either in the lower court or on the original hearing in the Kentucky Court of Appeals. Goode recovered a judgment in the trial court which the Kentucky Court of Appeals reversed. Thereupon, for the first time, in a petition for rehearing in the last named court, Goode's counsel called attention to the Federal Act as applicable. In the response to said petition for rehearing the Court of Appeals (155 Ky. 153, 159 S. W. 695), held that:

"The case as made up in the lower court by the pleadings, evidence and instructions, was practiced under the rules of law prevailing in this State and not under the Federal Statute known as the Employers' Liability Act, and we do not see our way clear, in the condition of the record as it now stands, to define the rights of appellee or the liability of the appellants under the Federal Statute. But on the return of the case the lower court will permit the parties to tender and file such amended pleadings as they may desire, and will hear and adjudge the case under the Federal Statute, and in accordance with the rules of law and practice applicable thereto."

It is impossible for us to reconcile this ruling in Goode's case with the refusal of the same court to reverse the judgment in the case at bar and remand it to the trial court with directions to permit the parties to try the case under the Carmack Amendment, as we asked be done, and to amend their pleadings accordingly if deemed necessary. Our case is much stronger for such a course being taken by the Kentucky Court of Appeals than was the Goode case, in that we raised the Federal question on the original hearing in that court as well as in a petition for rehearing; while, in the Goode case, the Federal question was not raised on the original hearing, nor until after the Court of Appeals had decided the case. Then, in Goode's petition for rehearing, the Federal question was raised for the first time. And that court, as requested in said petition, so modified its opinion as to direct the lower court, on another trial, to permit the pleadings to be so amended as to bring the case within the Federal law, and to remove it from the operation of the State law under which, until the filing of the petition for rehearing in the Kentucky Court of Appeals, it had been practiced by both parties.

The question naturally arises: If the Kentucky Court of Appeals concluded that Goode's case must be tried again, under the Federal Employers' Liability Act (although both parties had had their day in court—both trial and appellate—without making any reference to said Act), because it was exclusive and superseded the law of the State that would otherwise be applicable, and notwithstanding the Federal law was neither pleaded

nor relied upon on the first trial, or on the original hearing on appeal, was it not most illogical and inadmissible for that court to deny plaintiff in error the right to a like procedure in the case at bar?

If the Employers' Liability Act was exclusive in Goode's case, the Carmack Amendment is equally exclusive in this case.

If Goode's laches in failing to plead and rely on the Employers' Liability Act in the trial court, or on the original hearing in the Kentucky Court of Appeals, did not foreclose his right to have his case tried again, under said Act, why should plaintiff in error's laches in the case at bar, in failing to plead and rely on the Carmack Amendment in the trial court, foreclose its right to have the case tried again in that court, under said amendment? We raised the question more timely than Goode did. He waited until after the Kentucky Court of Appeals had decided the case against him before attempting to raise the Federal question—in a petition for rehearing in that court. But we raised the Federal question in this case on the original hearing in that court, as soon as we could do so after the Croninger, Latta and Miller cases were decided; and again raised it in our petition for rehearing.

Furthermore, it was just as knowable to Goode and his counsel when his suit was brought that he was within the protection of the Federal Employers' Liability Act, as it was when they filed the petition for rehearing. While, in our case, the Hughes and Solan cases and the absence of any direct reference to the subject in the Car-

mack Amendment, seemed to foreclose the Federal question against us until the Croninger case was decided. We raised the Federal question as soon as it seemed worth while to do so.

The argument in defendants in error's brief that they would have been prejudiced by the application of the Carmack Amendment "Points to no evil or hazard of evil" (208 U. S. on p. 188), forasmuch as if the Court of Appeals had reversed the judgment and remanded it to the lower court for retrial under the Carmack Amendment, as we asked, if defendants in error had any defenses to put in against the enforcement of the contract in accordance with said amendment full opportunity would be given them to make such defenses at that time.

Again, suppose, for the sake of the argument, that plaintiff in error, notwithstanding the bill of lading valuation of not exceeding $100 for each of the seven horses shipped, had wanted to favor defendants in error, and, consequently, had agreed with them that it would waive its right to insist that it would settle for the horses at the rate of not exceeding $100 a head, but would pay for them on the basis of the verdict of the jury in this case, would not such a concession by the carrier in favor of the shippers have been an obvious discrimination practiced by the carrier in plain disregard of the Interstate Commerce Act? If so, should the courts force plaintiff in error to do that which it would have violated the law in doing voluntarily?

We earnestly insist that the Carmack Amendment must be treated as having been written, by operation of

law, into the contract in this case and into every other limited valuation contract for interstate transportation entered into between shipper and carrier since said amendment became law, and that neither the shipper, the carrier, nor the courts can, if they would, avoid the effect of such interpollation of said law into all such shipping contracts.

II. THE COURT OF APPEALS OF KENTUCKY ERRED IN HOLDING THAT THE LIVE-STOCK CONTRACT WAS NOT PLEADED, IN REFUSING TO APPLY THE CARMACK AMENDMENT, AND IN HOLDING THAT THE SHIPMENT WAS GOVERNED BY KENTUCKY LAW.

But counsel for defendants in error attempt to escape the effect of the Carmack Amendment in this case by arguing that plaintiff in error did not plead the live-stock contract and said amendment; did not defend on such ground in the trial court; and that its defense on said ground in the Kentucky Court of Appeals came too late to raise a Federal question, so as to give this court jurisdiction of this writ of error.

In support of their position counsel for defendants in error quote at length from the opinion of the Kentucky Court of Appeals on this point. (152 Ky. commencing on page 406.)

Among other statements made in that part of the opinion of the Court of Appeals so quoted is that "on November 9, 1911, upon motion of appellant, the appellees filed the bill of lading." This statement is incorrect. The record shows that on November *19*, 1911, defendant (plaintiff in error) filed a motion stating that

the contract sued on in this action was in writing, and had not been filed as an exhibit with the petition, or as part thereof, and defendant moved that plaintiffs (defendants in error) be required to file said written contract as an exhibit with their said petition.

But the record further shows that *on the day preceding that on which said motion was filed*, to-wit, on November *18*, 1911, the defendants in error had an order entered as follows: "Come the plaintiffs and file the contract of shipment referred to in the petition herein, and the same is now noted of record." So that, as a matter of fact, the plaintiffs had already voluntarily filed the live-stock contract *as a part of their petition* the day before plaintiff in error's motion to that end was filed, and which latter motion was therefore surplusage, and obviously made in ignorance of or overlooking the fact that the live-stock contract had been filed by defendants in error on the preceding day. As further evidence of this, it will be observed from the record that there is no order showing that the trial court ever took any action upon plaintiff in error's said motion of November 19, 1911.

Therefore, it is not true to say that the live-stock contract was filed upon motion of plaintiff in error. It may be that counsel for defendants in error anticipated that such a motion would be made, and therefore filed the live-stock contract without waiting to be ruled to do so. But however this may be, the contract was filed by the free action of defendants in error, and not as a result of a motion by the plaintiff in error, or a rule of

court. This being the state of the record, we do not see how it lies in the mouths of defendants in error to contend that the live-stock contract is not a part of the record for all purposes. We insist it is, and that, being a part of the record, indeed of the petition of the defendants in error, in stating their cause of action, it was not necessary for the plaintiff in error to plead and rely upon the Carmack Amendment as applicable to the shipment made under said contract.

It follows from what we have said that the Court of Appeals of Kentucky was in error in the response to the petition for rehearing (153 Ky. 186), in saying:

"The defense which the defendant now relies on does not arise under the Act of Congress; it arises under a written contract, and the provisions of this written contract were not pleaded. The bill of lading was not filed with the petition; it was filed in the action after the answer was filed in response to a rule, and is not a part of the pleadings."

As we have pointed out, the record shows not only that the bill of lading was made a part of the pleadings, but that this was done by the defendants in error, of their own free will. The whole of the contract having been thus *pleaded by defendants in error*, the rule of law discussed in the response of the Kentucky Court of Appeals to the petition for rehearing with respect to the plaintiff in error's pleading the clauses of the contract limiting its liability, if it was required to rely on them, is inapplicable, even if otherwise sound. When defendants in error filed the live-stock contract, it became a part

of the record for all purposes, and it was wholly unnecessary for the plaintiff in error to plead reliance upon any of the limitations incorporated in said contract in order to avail of them.

There are two methods by which an instrument sued upon may be made a part of the record, (a) by the party himself filing the instrument as an exhibit with his pleading and making it a part thereof, and using it in evidence, and (b), by order of court. If the act of the defendants in error in filing the live-stock contract in open court, and specifying in the order that the instrument was *the contract referred to in the petition*, and then causing it to be noted of record, and the testimony of one of them that said bill of lading was the contract sued on, did not make it a part of the record, then it is difficult to conceive how it could have been so made. We know of no more effective way to make an instrument a part of the record.

When the live-stock contract was thus made a part of the record by defendants in error it was as much a part of the petition as if it had originally been filed therewith, and the whole of said live-stock contract, including clause nine thereof, was before the court for all purposes as effectually as though defendants in error had expressly quoted said contract, including said clause nine thereof, in their petition.

The contract in question is the only contract that was made for the shipment of these horses. This is admitted not only by the action of defendants in error in filing the contract as a part of their petition, but is so testified to

by at least one of them. Defendants in error having filed said contract, having conceded that it was the only contract that was made, and that this shipment was made at the reduced rate mentioned in said contract, and referred to in clause nine thereof, it necessarily follows that they are bound by said contract, and by each and every provision thereof, including said clause nine.

We do not regard it as at all essential to our position that we are entitled to have the judgment of the Court of Appeals which refused to apply the Carmack Amendment to this case reversed, on account of the fact disclosed in the record that the live-stock contract was filed, voluntarily, by defendants in error, instead of in response to a motion made in that behalf by plaintiff in error, as erroneously stated in the opinion of that court.

But we think it only right that the correct state of the record on this point should be pointed out to this court.

As to all interstate shipments after the approval of the Act of June 29, 1906, of which the Carmack Amendment is a part, Congress, in effect said to all the courts of the United States, both Federal and State, that no other law but that should be applied.

All courts of this country, both State and Federal, are presumed to take judicial notice of the Interstate Commerce Law and the amendments thereto, and it is not necessary to plead them.

When the Congress of the United States, in the exercise of the power conferred upon it by the Constitution to regulate commerce with foreign nations, and among

the several States, adopted the act to regulate commerce, which was approved February 4, 1887, and the subsequent acts amendatory thereof, including the Carmack Amendment, Congress spoke for all the people and all the States, and thereby established a policy for all. That policy is as much a policy for the State of Kentucky as if those acts had emanated from its own Legislature.

It is elementary that the respective State courts must take judicial notice of acts of Congress as well, and to the same extent, as of the public acts of the State itself. It is also elementary that acts of Congress prove themselves. All this is too well settled to need citation of authority.

In the case at bar, therefore, it was the duty of the Fayette Circuit Court, in which this case was brought and tried, and of the Kentucky Court of Appeals to which it was appealed, to take judicial notice of the Interstate Commerce Act as amended by the Act of June 29, 1906, of which the Carmack Amendment is a part. Hence, it was not necessary for plaintiff in error to plead those acts.

In Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, *supra*, it was argued by counsel for defendants in error that no Federal question based upon the validity of the shipping contract was raised in the State court, but this court disposed of the contention adversely to the contender, saying:

"The contract of shipment, including the clause for the limitation of any recovery in case of loss or negligence, is substantially like the contract upheld in Adams

Express Co. v. Croninger, 226 U. S. 491. To take this case without the controlling influence of that case counsel say that no Federal question based upon the validity of the shipping contract was raised in the State court, and for this they rely upon a paragraph in the brief of one of the counsel for the express company filed in the court below in which it is said: 'For the purpose of this case, we are willing to concede that said provision in so far as it limits the liabilities of the company for $50.00, is void both under a statute of the State of Texas,' and under the provisions of the Carmack Amendment of Sec. 20 of the Act to Regulate Commerce of June 29, 1906.

"That such a clause may be void under the legislation of Texas may be true. But that it is valid, if fairly made for the purpose of applying to the shipment the lower of the two rates based upon valuation, is not now an open question. Adams Express Co. v. Croninger, cited above.

"That case had not been decided when this case was heard in the State court, and there was much diversity of opinion as to the meaning of that section when counsel made the concession. At most it was a concession for purposes of argument as to a matter of law and could not conclude anyone, since it did not operate to withdraw the shipping contract from the case, nor its validity from the court's consideration."

This language completely answers the argument in the brief on the other side that plaintiff in error waived its right to have this case decided under the Carmack Amendment because it asked an instruction as to the measure of damages which was inconsistent with said amendment, and because plaintiff in error, in its motion for new trial in the lower court, did not make the same claim as to the effect of said amendment that it made in the Kentucky Court of Appeals and makes here. Such

concessions by plaintiff in error as to matters of *law* "could not conclude anyone," since they "did not operate to withdraw the shipping contract from the case, nor its validity from the court's consideration."

The case at bar, as well as the Neiman-Marcus case, were tried in the lower courts before the Croninger case was decided, and counsel in this case are no more to be foreclosed from having the Carmack Amendment applied, because they did not anticipate that this court would construe said amendment as was done in the Croninger case, than were counsel for the express company so foreclosed by an explicit waiver in the Neiman-Marcus case.

And the last named case also demonstrates the unsoundness of the opinion of the Kentucky Court of Appeals which, in its last analysis, denied plaintiff in error the relief sought on the ground that it had waived its rights under the Carmack Amendment because it did not expressly plead and rely thereon in the trial court.

In M. K. & T. R'y Co. v. Wulf, 226 U. S. 570, the mother of an employe killed in railroad service brought suit, January 23, 1909, in her individual capacity, as his sole heir, next of kin, and beneficiary, in the Circuit Court of the United States for the Eastern District of Texas, to recover damages for his death. The original petition asserted a cause of action under the laws of Kansas, without making reference to the Federal Employers' Liability Act, under the latter of which the mother, although sole beneficiary, could not maintain an action, except in the capacity of personal representative.

On May 19, 1909, the railway company filed its original answer, which consisted of a general demurrer, a traverse of the allegations of the petition, and a plea of contributory negligence and other affirmative pleas. No further steps were taken until January 6, 1911, when the railway company filed an amended answer pleading and relying on the Federal Employers' Liability Act. On the same day the plaintiff filed her first amended petition averring, among other things, that when her original petition was filed there had been no administration upon decedent's estate, but that on January 4, 1911, she was appointed temporary administratrix of his estate, by a court of competent jurisdiction, which she named. Thereupon defendant filed its second amended answer, in which it excepted to that portion of the amended petition making Sallie C. Wulf a party plaintiff, because she was not a proper party under said Employers' Liability Act, and because the amendment making her a party as temporary administratrix was filed more than two years after the cause of action accrued, and for that reason the cause of action, if any, was barred by the limitation of two years. All the exceptions being overruled, a trial was had upon the issues of fact, and resulted in a verdict and judgment in favor of plaintiff, which was affirmed by the Circuit Court of Appeals for the Fifth Circuit, and thereafter appealed to this court, which affirmed the judgment in an opinion in which the following language was used:

"It is true the original petition asserted a right of action under the laws of Kansas, without making refer-

ence to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment it had the effect of superseding State laws upon the subject. Second Employers' Liability Cases, 223 U. S. 1, 53. Therefore the pleader was not required to refer to the Federal Act, and the reference actually made to the Kansas Statute no more vitiated the pleading than a reference to any other repealed statute would have done."

See, also, to the same effect the still later case of St. L. & S. F. R'y v. Seale, 229 U. S. 156.

Likewise, the Circuit Court of Fayette County, Kentucky, and the Court of Appeals of Kentucky, were "presumed to be cognizant of the enactment of the" Carmack Amendment to the Interstate Commerce Act, on the trial of the case at bar, "and to know that with respect to the responsibility of interstate carriers by railroad" as to interstate shipments, "after its enactment it had the effect of superseding State laws upon the subject. Therefore the pleader was not required to refer to the Federal Act." In other words, as we understand the opinion of this court in the Wulf case, where a Federal Act, superseding State laws, applies, it is the duty of the court to try the case under the act whether or not the parties call attention to or rely on it by pleading.

So far as it affects the shipment here, the Carmack Amendment repealed Sec. 196, Ky. Const., and the Kentucky courts erred in applying the latter, and in not applying the former, whether or not it was pleaded or

relied on by either of the parties to the suit. The cases, *supra*, seem to us to be conclusive of this proposition.

In M. C. R. Co. v. Vreeland, 227 U. S. 59, in discussing the Federal Employers' Liability Act, this court held that while Congress had always had the power to regulate the liability of interstate carriers to their employes for injuries, Congress did not exert the power until the enactment of the Employers' Liability Act; that until then the subject was within the police power of the States; but that since the passage of said Act it was paramount and exclusive and will so remain unless and until Congress shall again remit the subject to the States.

This is necessarily equally true of the Carmack Amendment as affecting interstate transportation. Said amendment is paramount and exclusive, and no other law in conflict therewith can be applied in any court, for, as to that subject, it is just as though the conflicting law is not and never has been the law. But we do not need to reason by analogy for the question has been expressly decided by this court.

In Adams Express Co. v. Croninger, 226 U. S. 491, 505, 506, *supra*, in speaking of the Carmack Amendment, the court said:

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulations or contract. Almost every detail of the subject is covered so completely that there

can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist.

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

If, then, from the time of its enactment, the Carmack Amendment superseded Sec. 196, Ky. Const., as applied to interstate shipments, and if, as the court said in the cases, *supra*, it was not necessary for the pleader to refer to the Federal Statute in order to make it the duty of the court to apply such Federal Statute—there being no other law to apply, such other law having been superseded by the Federal law applicable to the subject-matter—is not the argument submitted in this court on behalf of the defendants in error wholly inadmissible?

The argument assumes it is necessary that the Federal Act be pleaded in order to be applicable. This, as we have seen from the Neiman-Marcus, Wulf, Seale and

Croninger cases, is a misconception of the supremacy and exclusiveness of the Carmack Amendment. Said argument treats said amendment as though its enforceability in the courts depends upon the accident or oversight as to whether or not it is expressly pleaded and relied on; and that, if it is, it applies; but if it is not, it does not apply.

We think this is a fair statement of the position of the other side. If so, the mere statement of the proposition carries its own refutation.

Certainly it will not do to say that Section 196, Ky. Const., is still in full force and effect as to all contracts made or to be performed in that State, covering transportation in interstate commerce, where, in litigation growing out of the breach of such contracts, the parties do not expressly plead and rely on the Carmack Amendment, but that said constitutional provision has been repealed by said amendment in all such cases, where the parties do plead and rely on said amendment.

This would be to leave the enforcement of a Federal law to the discretion, inclination or even caprice of litigants, which is quite as unthinkable as the opinion in the Croninger case says it would be to assume that, in enacting the Carmack Amendment, Congress did not mean that said amendment should be supreme, and was not to be increased or diminished by local regulation or local views of public policy.

For the Kentucky Court of Appeals to hold, as it has done, that the Carmack Amendment applied in the Rankin and Dodd cases, whereby they were limited to

recovering the contract valuation of the animals injured in shipment, but does not apply in the case at bar, and that, therefore, defendants in error are entitled to recover *more than twenty times* the contract valuation, is to hold that the Carmack Amendment repealed Section 196, Ky. Const., as to Rankin's and Dodd's shipments, but did not do so as to Woodford and Ireland's, although all of them were made since the amendment was enacted, and is to make said amendment less than supreme, which this court held in the Croninger case was unthinkable.

The answer the Kentucky Court of Appeals attempts to make to this argument (153 Ky. 185—response to petition for rehearing) is that while the State courts must take judicial notice of acts of Congress no less than of acts of the State Legislature, and that it is not essential that the Federal question should have been raised in any special form in the trial court, that it was essential that the facts on which the Federal question rests must be presented in the record, and that this was not done in this case for as much as the bill of lading was not filed with the petition and was not a part of the pleadings. But, as we have already shown, the assumption that the bill of lading (live-stock contract) was not pleaded is erroneous. It was made a part of the record, and of the petition of the defendants in error, by their own voluntary act and thereby became a part of the record for all purposes, as effectively as if it had been quoted in, or expressly made an exhibit to, the original petition filed

by defendants in error, or had been expressly pleaded and relied on as a defense by plaintiff in error.

Furthermore, with great respect for that deservedly distinguished court, we think that court failed to realize the supreme and exclusive character of the Carmack Amendment as applied in interstate shipments; and failed to read the Carmack Amendment into the bill of lading, as a part thereof, as the court should have done.

It is admitted, as we have said, and as the Kentucky Court of Appeals concedes in the response above noted, that the bill of lading is a part of the record. The court refused to consider it only because it was not pleaded and expressly relied on by plaintiff in error, although filed by the other side, and made part of the record by them. But, on authority of the cases, *supra*, it is not necessary that the contract should have been pleaded. It was the duty of the Kentucky courts to take cognizance of and apply the Carmack Amendment to the bill of lading which is a part of the record, without said bill being specially pleaded. Otherwise, as we have pointed out, the application of said Act of Congress will be made to depend on many things, including errors or omissions of counsel, and the law will be in worse confusion than was the condition which Congress sought to remedy by the Carmack Amendment.

If the Carmack Amendment is only to be applied when the parties choose to apply it, or think to ask that it be applied, that amendment had as well never have been enacted. In fact, the last state of the law is worse than the first. For, if the law must be invoked by the

parties in order for the courts to apply it, the carrier may favor one shipper by failing or refusing to invoke the Carmack Amendment in his case, and discriminate against another shipper, by invoking said amendment in his case, and, thereby, in effect, pay the first shipper a rebate while refusing like treatment to the second shipper, and the discriminatory conditions with respect to railroad rates, rebates, and the like which existed prior to 1887, and which the Interstate Commerce Law was designed to forbid and prevent will be revived and increased.

It is, we submit, most technical and inadmissible for the Kentucky court to say that the defense of plaintiff in error in this case arises under the written contract and not under the Carmack Amendment. It arises under both combined, or, rather, under the two made one. For, as we have said, the Carmack Amendment has, by operation of law, been written into every bill of lading, live-stock contract or receipt for an interstate shipment which has been issued in the United States by an interstate railroad carrier since said amendment became the law, and it is beyond the power of the carriers, the shippers or the courts to alter or ignore this condition.

III. THIS CASE DOES NOT FALL UNDER THE THIRD CLAUSE, BUT UNDER THE SECOND CLAUSE, OF SECTION 709, REVISED STATUTES OF THE UNITED STATES.

We might well rest our case on the grounds we have already argued, without discussing the grounds argued in defendants in error's brief at all. But in order that our case may be fully argued we will now briefly show

that the cases relied on by them do not apply; that this case falls within the second, not the third, clause of Sec. 709, Rev. Stat.; that our Federal question was sufficiently raised to require the Kentucky Court of Appeals to decide this case with reference to said question; that said court erred in refusing to do so; and that the record so presents the question as to authorize this court to consider and decide it and to revise the judgment of the Kentucky Court of Appeals which refused to sustain the contention of the plaintiff in error under said Federal question.

It would unduly lengthen this brief for us to comment, in detail, on the long list of cases cited in the digest-appendix to the brief for defendants in error. If it were otherwise, we would deem it unnecessary to do so.

In most of those cases, many of them criminal, the pretended Federal questions, which this court held were raised too late, were very unlike the Federal question in this case. Those cases mainly concerned the constitutionality of State Statutes when subjected to the test of the Fourteenth Amendment; the denial of "full faith and credit," by courts of one State to Statutes of another State, and the like.

In none of the cases, so far as we have been able to find, was the question presented, as here, as to whether or not, where there was a State constitutional provision or statute, and also an Act of Congress which was paramount and exclusive, relating to the same matter, and where the Congressional Act necessarily was inconsistent with, and repealed, the State Statute, it was the duty

of the State court to take judicial notice of the applicable and controlling Federal Statute, and apply it, without the latter statute being expressly pleaded and relied on in the trial court.

And, furthermore, there are, among the cases so relied on by the other side, a number which support our contention, among which may be enumerated Morrison v. Watson, 154 U. S. 111, where the plain intimation was given that if the Federal question had been claimed in any form "before judgment in the highest court of the State," it would have been in time. French v. Hopkins, 124 U. S. 524, supports the same view. The Federal question was certainly so claimed here, as the original opinion of the Kentucky Court of Appeals under review shows. (152 Ky. 298.)

Among the cases cited by counsel on the other side is Yazoo and Mississippi Valley R'y Co. v. Adams, 180 U. S. 1, which we think is germain to our case. In that suit it was sought to recover taxes for the State of Mississippi from the railway company. There was no suggestion of a Federal question in the lower court on the original hearing, or in the State Supreme Court on appeal. The lower court adjudged the railway company should pay a part of the taxes sued for. The Supreme Court reversed the judgment on the ground that the railway company should pay all the taxes sought to be recovered, and remanded the case for judgment accordingly. The railway company then, for the first time, attempted to set up a Federal question in the trial court. Under the State practice, the trial court refused to con-

sider the Federal question because not made on the first trial. The State Supreme Court affirmed said ruling. While this court affirmed the judgment, the opinion, after saying that the Mississippi courts could not have held the railways liable for the taxes without deciding the Federal question, used this language:

"In short, the case is one of those frequently arising under the second clause of Rev. Stat., Section 709, in which the validity of a State Statute under the Constitution of the United States is necessarily drawn in question, and the decision of the State court being in favor of its validity, this court will take jurisdiction, though the Federal question be not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section where a right, title, privilege or immunity is claimed, that the Federal question must be specially set up. The cases are collected in Columbia Water Power Co. v. Columbia Electric Street Railway Co., 172 U. S. 475, 488. Thus, in Willson v. Blackbird Creek Marsh Co., 2 Pet. 245, the record did not show that the constitutionality of an act of a State Legislature was drawn in question; 'but,' said the Chief Justice, 'we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the State court. So, in Satterlee v. Matthewson, 2 Pet. 380, it was said that if it sufficiently appear from the record itself that the repugnancy of the statute of a State to the Constitution of the United States was drawn in question, this court has jurisdiction, though the record does not in terms declare that this question was raised. See also Crowell v. Randell, 10 Pet. 368; Furman v. Nichol, 8 Wall. 44; Chicago Life Ins. Co. v. Needles, 113 U. S. 574; Eureka Lake, etc., Co. v. Yuba County, 116 U. S. 410; Kaukauna Co. v. Green Bay & Mississippi Canal, 142 U. S. 254. And the fact that the Supreme Court of the State did not expressly refer to

the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision. As was said by Chief Justice Waite in Chapman v. Goodnow, 123 U. S. 540, 548: 'If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused.' "

Our case is very much stronger for this court's taking jurisdiction than was the case last quoted from. Here the State court, in affirming a judgment which allowed defendants in error more than twenty times as much as they were entitled to under the Carmack Amendment, necessarily held that Section 196, Ky. Const., was valid as applied to the interstate shipment in this case, regardless of the Carmack Amendment, of which it was the duty of the Kentucky courts to take judicial notice. This raised a vital Federal question. It was, in effect, a holding by the Kentucky court that that which is supreme (the Carmack Amendment enacted by Congress on authority of the commerce clause of the Federal Constitution), must yield to that which was not supreme (Section 196, Ky. Const.), thereby reversing the order of precedence declared by this court in McCulloch v. Maryland, 4 Wheat. 316, and reaffirmed in the Second Employers' Liability cases, 223 U. S., pp. 53, 54, and in many other cases, that the Federal Constitution and the laws made in pursuance thereof are supreme; and that they

control the Constitution and laws of the respective States, and can not be controlled by them.

In this case, the Federal question was at least raised in the highest court of the State *before* the case was tried and decided in that court. In the Adams case the Federal question was not suggested until after the State Supreme Court had decided the case and remanded it to the trial court, and where, on the second trial, the question was attempted to be raised. *This case comes under the second clause of Section 709, Rev. Stat. and not under the third clause of said section.* The cases cited in that part of the opinion in the Mississippi case which we have last quoted are directly applicable to this one. There is directly drawn in question here the validity of Section 196, Ky. Const., on the ground that it is repugnant to the Carmack Amendment, as applied to interstate commerce. And this brings this case squarely within Clause 2, Section 709, Rev. Statutes, which reads, in full, as follows:

"(2) Where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity."

The effect of the decision of the Kentucky Court of Appeals is necessarily that the Carmack Amendment does not apply to the shipment here involved, but that Section 196, Ky. Const., does apply, and is constitutional when so applied. Thereby, the Kentucky court decided in favor of the validity of said Section 196 as ap-

plied to this interstate shipment, and which decision was repugnant to the law of the United States known as the Carmack Amendment.

In a case coming under the second clause of Section 709, Rev. Stat., if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed does not preclude a review of such question by this court. In this case, the bill of lading (or live-stock contract) under which the shipment was made is a part of the record—made so by defendants in error of their own accord. While the Kentucky Court of Appeals erroneously refused to consider the Federal question because plaintiff in error did not expressly plead reliance upon said bill of lading, as held to be required by the State practice, nevertheless, the decision of the Federal question was necessarily involved in the case, because it could not be determined without deciding that question, *i. e.*, without deciding that notwithstanding the Carmack Amendment this case was governed by Section 196, Ky. Const., and which is repugnant to the Carmack Amendment as applied to interstate commerce.

In the Columbia Water Co. Case, *supra*, 172 U. S. 475, there was a motion to dismiss the writ of error from this court, for want of jurisdiction, on the ground that the Federal question was not specially set up and claimed in the State court. This court, while affirming the judgment on other grounds, refused to grant the motion to

dismiss, and after quoting Section 709, Rev. Stat., and holding that as to cases coming under the third clause thereof, the Federal right must be, with possibly some rare exceptions, specially set up or claimed in the State court to give this court jurisdiction, said:

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a State statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. Miller v. Nicholls, 4 Wheat. 311; Willson v. Blackbird Creek Marsh Co., 2 Pet. 245; Satterlee v. Matthewson, 2 Pet. 380, 410; Fisher's Lessee v. Cockerell, 5 Pet. 248; Crowell v. Randell, 10 Pet. 368; Harris v. Dennie, 3 Pet. 292; Farney v. Towle, 1 Black, 350; Hoyt v. Shelden, 1 Black, 518; Railroad Co. v. Rock, 4 Wall. 177; Furman v. Nichol, 8 Wall. 44; Kaukauna Co. v. Green Bay, etc., Canal, 142 U. S. 254.

"The case under consideration falls within the second class, and, as it appears from the record and from the opinion of the court, which may be examined for that purpose (Kreiger v. Shelby Railroad, 125 U. S. 39), that the question was presented and decided, that the Act of 1892, affirming the validity of the defendant's contract with the board of directors of the State penitentiary did not impair the obligation of plaintiff's contract, evidenced by the Act of 1887, because that act properly construed conveyed no exclusive right, we think the Federal question sufficiently appears."

The fact that the Kentucky Court of Appeals refused to consider and decide the Federal question does

not affect the authority of this court to review the judgment of the Kentucky court. As was said in Chapman v. Goodnow, 123 U. S. 540, 548:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

To the same effect see Dewey v. Des Moines, 173 U. S. 199.

As we have seen, while this case was pending and undecided, in the Court of Appeals of Kentucky, counsel for plaintiff in error, as soon as the opinions of this court in the Croninger, Miller and Latta cases, *supra,* came to their notice, prepared and filed in said Court of Appeals a supplemental brief, agreeably to the practice in that court, calling its attention to the opinions in said three cases, printed with said brief, as an appendix thereto, all three of said opinions, and distinctly raised the Federal question in said court at said time. All this is fully shown by the opinion of the court, and which is a part of the record here.

This seems to us to be another reason why the State court should have considered the Federal question, and why the refusal of said court to do so does not preclude this court from deciding it. The State court was given

two opportunities to decide the question—on the original hearing and on the petition for a rehearing. Its declination to do so was based on the State practice (but which conclusion, as we have shown, was arrived at by a misapprehension as to the circumstances attending the filing of the live-stock contract and making the same a part of the record, indeed a part of the statement by the defendants in error of the cause of action they sued on).

Without, in the least, questioning the motive or the sincerity of the State court in so holding, we think it is only proper to point out that on the same ground the highest court of any State could defeat the jurisdiction of this court in any case on writ of error, and the protection thrown around litigants by Section 709, Rev. Stat., could be entirely defeated. In this connection we quote from Erie R. Co. v. Purdy, 185 U. S. on p. 153, as follows:

"So, if the highest court of the State, by its final judgment, sustains the validity of a State enactment drawn in question there as repugnant to the Constitution, treaties or laws of the United States, or denies a right, privilege or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute or authority exercised under the United States, this court could review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court."

Applying the language quoted to this case we find that the highest court of Kentucky did sustain the validity of Section 196, Ky. Const., notwithstanding, on the original hearing in that court, plaintiff in error drew

into question the validity of said constitutional provision, as repugnant to a law of the United States, to-wit, the Carmack Amendment to the Interstate Commerce Act, and which was enacted pursuant to authority vested in Congress by the commerce clause of the Federal Constitution. Therefore, even though "no Federal question was distinctly raised or insisted upon in the trial court," "this court could review that judgment."

And the attention of the Kentucky Court of Appeals was again called to the Federal question in plaintiff in error's petition for rehearing, which is a part of the record in this court, and, in its response overruling said petition the court again refused to consider and decide the Federal question on the ground that the bill of lading was not specifically pleaded in the lower court by the plaintiff in error, although the defendants in error pleaded it in their petition, stating their cause of action, and subsequently filed the same as the contract sued on and referred to in their petition and by their own act made the same a part of the record by an order of the trial court.

Thus, it will be seen that there is no doubt as to the Federal question having been abundantly raised in the highest court in Kentucky. And there are a number of opinions of this court which hold that where the Federal question is so raised, this is sufficient, even under the third clause of Section 709, Rev. Stat. In fact, while the weight of authority seems to be to the contrary, there are a number of opinions of this court which hold that the Federal question is timely if raised in the high-

est court of the State in a petition for rehearing filed after the court has heard and decided the case without having its attention called to the Federal question. But as our case is very much stronger than any of these to support the jurisdiction of this court, we do not deem it material to cite or quote from any of the cases last referred to.

IV. PLAINTIFF IN ERROR DID NOT WAIVE ITS RIGHT TO HAVE THE CARMACK AMENDMENT GOVERN THIS CASE, BY FAILING TO PLEAD SAID AMENDMENT.

The opinion and response to the petition for rehearing delivered by the Court of Appeals of Kentucky in this cause (152 Ky. 298, 153 Ky. 185, Record, pp. —) in their last analysis are rested upon the theory that plaintiff in error is estopped from having the Carmack Amendment applied in this cause because, by failure to plead reliance upon said amendment, plaintiff in error waived the Federal question.

It seems to us so to hold was wholly to misconceive the doctrine of waiver amounting to an estoppel.

A waiver is an intentional relinquishment of a known right. This is made clear by the authorities:

Stackhouse v. Barnston, 10 Vesey, Jr., side page 466;
Amer. & Eng. Encyc. of Law (2d ed.), 1091, 1095;
Christianson v. Carleton, 69 Vermont, 91, 37 Atl. 226, 7;
First Nat. Bank, etc., v. Hartford L. & A. Ins. Co., 45 Conn. 25, 44, 33 Atl. 905;
Cable v. U. S. Life Ins. Co., 111 Fed. 19, 31;
Rice, *et al.*, v. Fidelity & Dep. Co. of Md., 103 Fed. 427, 435;

Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, *supra*.

As we have shown, plaintiff in error did not know when the issues were made up and the case tried in the lower court that this court would hold that the Carmack Amendment made valid the limited valuation provisions of contracts for interstate shipments. This question seemed, at that time, to be foreclosed against plaintiff in error by the cases cited on pages 4 and 5 of this brief. Therefore, manifestly, it did not *intentionally relinquish a known right*, which is what it must have done in order to be estopped from relying on the Federal question in the Court of Appeals of Kentucky and in this court, and which question lay dormant until it had life breathed into it by the Croninger, Miller, Latta, Neiman-Marcus Co., and other cases, *supra*, and which were not decided until this case had reached the Court of Appeals of Kentucky, and some of them not until after the decision of the latter court.

In conclusion, on the grounds we have argued and upon the authorities we have cited, we earnestly and confidently ask that defendants in error's motion to dismiss for want of jurisdiction be denied.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY LANE STONE,
ROBERT A. THORNTON,
CHARLES H. MOORMAN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 531.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - Plaintiff in Error,

versus

CATESBY WOODFORD AND JOHN T. IRELAND, - - - - - - Defendants in Error.

Supplemental Brief for Plaintiff in Error in Support of its Objection to the Motion of Defendants in Error to Dismiss for Want of Jurisdiction.

R. A. THORNTON,
CHAS. H. MOORMAN,
BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

March 18, 1914.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 531.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Plaintiff in Error.*

versus

CATESBY WOODFORD AND JOHN T. IRELAND, - - - - - - - *Defendants in Error.*

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR IN SUPPORT OF ITS OBJECTION TO THE MOTION OF DEFENDANTS IN ERROR TO DISMISS FOR WANT OF JURISDICTION.

For brevity, we will refer, in this supplemental brief, to defendants in error as plaintiffs and to plaintiff in error as defendant.

On November 11, 1913, plaintiff's counsel served notice on defendant's counsel that plaintiffs would, on Monday, December 15, 1913, move this Honorable Court to dismiss the writ of error in this cause for want of jurisdiction in this court to adjudicate the questions raised by said writ of error.

Thereafter, and before the date fixed in said notice, briefs were filed in this court by counsel for both parties, and the case was ready for submission on said motion on said date. But plaintiff's counsel did not then make said motion, nor has it yet been made.

But they have now given a new notice to the effect that said motion will be made on Monday, March 23, 1914. Defendant comes and renews its objections to the granting of said motion, and urges as additional grounds and arguments why said motion should be disallowed the following:

The reason why plaintiffs' motion was postponed from December 15, 1913, to March 23, 1914, is this: We pointed out in our original brief in support of our objections to the motion to dismiss, that whereas plaintiffs claimed, in their brief on said motion, that they filed the live stock contract in obedience to a motion by defendant for a rule to require them to do so, the record showed that they voluntarily filed said contract the day before defendant's said motion was made in the Fayette Circuit Court. While we did not then think, and so stated, and do not now think, that it is at all material whether the live stock contract, voluntarily filed by plaintiffs by an order of court they procured to be made, was filed before or after defendant's motion for rule was entered, defendants' counsel, for reasons best known to themselves, seem not to have wanted this court to pass on their motion with the record in that shape. Hence, they have delayed making their said motion, and, meantime, have attempted in the Kentucky Court of Appeals, to have corrected what

is claimed to be an error in the date in the record as to when defendant's motion for rule was entered.

It is conceded that the record in this court is exactly the same as the record on which this case was decided by the Court of Appeals of Kentucky. But it is claimed that the clerk of the Fayette Circuit Court made an error in making the transcript of the record of that court for the Kentucky Court of Appeals, in copying said date, and that it should have been November 9, 1911, instead of November 19, 1911.

Consequently, plaintiffs have filed, or will endeavor to do so, in this court what purports to be a corrected record made by the clerk of the Kentucky Court of Appeals by direction of said court, at plaintiffs' instance, and over defendant's objection, and which record shows said date to have been as last above indicated.

We will discuss the questions thus attempted to be raised from two angles:

(1) That the Kentucky Court of Appeals had no authority to direct its clerk to make and transmit to this court said so-called corrected record, and that it is not properly a part of the record for any purpose on this writ of error.

(2) Even if the record in this court is permitted to be changed as plaintiffs seek to have done, the correction is wholly immaterial and irrelevant either as concerns the hearing on plaintiffs' motion to dismiss or the hearing on the merits.

Of these in their order:

I.

The Kentucky Court of Appeals was without jurisdiction to direct its clerk to correct the record in this court. This case was not then in that court but exclusively in this court, as it has been ever since the allowance of the writ of error. And it is conceded that the record in this court is exactly the same as it was in that court during all the times that the case was in that court, and that there was no error committed by the clerk of that court in preparing the transcript of record filed in this court. The error, if any, was made when the clerk of the Fayette Circuit Court prepared the transcript of the record in that court for the Kentucky Court of Appeals.

Hence, we have the anomalous condition of the Kentucky Court of Appeals certifying to this court that the record on which that court decided the case was not correct, due to an error made in the Fayette Circuit Court, and have the further situation that the order made by the Kentucky Court of Appeals was made in a case which was not then in that court, and over which it had no control. The order thus made involved the correction of two records in the same case (1) the one in the Kentucky Court of Appeals and (2) the one in this court.

We contend that this can not be properly done for several reasons:

(a) The motion to correct the record came too late. In Federal Case No. 15,386, United States v. Hooe, *et al.*, 26 Federal Cases, p. 369, it was held that after a writ of error has been served and returned to this court the

record is no longer before the court below and can not be amended. In that case it appears the amendment was sought at the same term at which the judgment was rendered, whereas here the amendment was not sought until several terms of the Kentucky Court of Appeals had passed after the writ of error was allowed by this court.

(b) The case of Goodenough Horse-Shoe Mfg. Co. v. Rhode Island Horse-Shoe Co., 154 U. S. 635, cited in the opinion of the Kentucky Court of Appeals granting plaintiffs motion to correct the error, seems to us not to have authorized said action of that court. And especially is this true for the reason that there was no error in the record of that court which was transmitted to this court, and therefore nothing for that court to correct. The error was made in the Fayette Circuit Court, and if it is to be corrected at all it should be done in that court. (Chicago v. Bigelow, 131 U. S., page xciii, Appendix.)

(c) It was plaintiffs' duty to see that the record made for the Kentucky Court of Appeals by the Clerk of the Fayette Circuit Court, was correct before the case was heard by that court and submitted. (3 Cyc., 143, 148, 271.)

II.

We said in our original brief on plaintiffs' motion to dismiss that we regarded it as immaterial whether the filing by them of the live stock contract antedated or post-dated the making of defendant's motion for rule against plaintiffs to file said contract. It seems to us

this view is unanswerable. If so, it makes no difference whether or not plaintiffs succeed in having the record corrected as they are endeavoring to do. And the question discussed in the first part of this brief is unimportant except as it relates to correct practice.

The mere act of one of the parties to a litigation making a motion in court asking for a rule against the other party requiring or directing him to do a certain thing, has no force or vitality whatsoever, in and of itself. It is innocuous unless and until the court grants the motion and makes the necessary order of court to effectuate the court's ruling and judgment upon said motion. Before this is done, the party against whom the rule is asked is under no greater obligation to do anything concerning the matter to which the rule relates than he would be if no motion for rule had been made. And if, before the court acts on the motion, the party against whom the motion is made chooses, voluntarily, to come into court and do that which the rule, if granted, would require him to do, this constitutes a voluntary action of the party and not one done in obedience to the court's order. Thus it was here. Even assuming that defendant made the motion for the rule in question on November 18th, and that plaintiffs came into court and filed the live stock contract and had the order made showing this had been done on November 19th, inasmuch as the court had not at the latter time, acted on said motion (and, in fact, never did act on it), the legal effect of plaintiffs' said action was precisely the same as if, without any motion therefor having been made, they had come into court on

their own suggestion and filed said contract as a part of their petition. There is nothing in the order which they had made in court when they filed said contract showing that it was done otherwise than as their voluntary act, or was done because defendant had moved the court to issue a rule requiring that it be done. The order reads: "Come the plaintiffs and file the contract of shipment referred to in the petition herein, and the same is now noted of record." Even if it may be surmised that the mere making of the motion by defendant had the effect of stimulating plaintiffs to file the contract, the further assumption is certainly equally tenable that plaintiffs' counsel, having the fact of their failure to file the live stock contract as a part of their petition when the latter was filed brought to their attention by defendant's motion, concluded that they had omitted to do something which was material to the cause of action of their clients, and, therefore, they hastened to cure such omission, not upon any idea that they would thereby help defendant's defense, but would, by so doing, perfect their statement of plaintiffs' cause of action. This we say is a most reasonable assumption.

And, again, if plaintiffs' counsel had not regarded the averring and proving of the live stock contract as a part of their case, why should they have asked that the live stock contract be filed as a part of plaintiffs' evidence. Yet this is what they did (R., p. 179).

But, regardless of the reason which actuated plaintiffs in filing the contract, voluntarily, and making it a part of their petition, as the order of court they had made

shows was done, it is sufficient for our purpose to show that the filing of said contract was the act of plaintiffs, and not that of defendant, nor of the court.

Therefore, all that is said in our original brief as to the necessity of treating the live stock contract in this case with the same effect as if it had been expressly declared on by plaintiffs in their petition, and attached to and make part thereof, is equally applicable if plaintiffs succeed in having the record corrected, as they propose, as it would be if the record is not corrected.

And it is worthy of remark that the Kentucky Court of Appeals, in its opinion delivered February 12, 1914, while authorizing and directing the correction of the record, expressly stated: "Why the error in the transcript is material we do not understand."

III.

There is one matter, not discussed in our original brief, to which we wish to refer here.

The response of the Kentucky Court of Appeals to defendant's petition for rehearing (R., p. 367) seems to be rested upon the view that each of the provisions of the live stock contract having reference to limitations upon defendant's liability, including the clause of said contract fixing the prices of the animals, constituted *exceptions* to the contract, and that "If the defendant desired to rely upon any of these clauses limiting its liability, it was incumbent upon it to plead the clause in its answer. It was not incumbent upon the plaintiff to anticipate and

negative all the exceptions set out in the separate clauses of the contract." And a Kentucky case is cited in support of the language we have quoted.

It seems to us the position of the Kentucky court is wholly untenable. Plaintiffs pleaded the whole of the contract, as a part of their petition, in our view of the matter as we have endeavored to point out. Thereby the contract was in the case for all purposes, to say nothing of its also having been put into the case by plaintiffs as a part of their evidence. It was no more defendant's duty to plead in its answer that it relied on particular portions of the contract as a defense, in whole or in part, to plaintiffs' claim asserted in their petition, than it was their duty to plead specifically in their petition that they relied on particular clauses of the contract to support their cause of action against defendant. The mistake of the Kentucky court began when it treated the live stock contract as not having been put into the case by plaintiff. From this first error, it was logical, perhaps, but incorrect, to conclude that it was necessary for defendant to plead the contract, or such parts of it as it counted on in defense, if it wanted to avail itself of them.

But if, as we contend, the live stock contract was put into the case by plaintiffs, then it is there for all purposes, each and every part of it. There are no *exceptions* in the contract such as the Kentucky court discusses All of its provisions are of equal dignity, and no part is any more an exception than any other part.

The contract, among other things, recites at the outset that:

"The carrier will carry live stock at the rates established by it therefor, or, where certain risks, duties and liabilities are assumed by the shipper, as hereinafter specified, will carry said live stock at greatly reduced rates. In the present instance the shipper elects to avail himself of the said reduced rate. * * * In consideration of all of which the shipper hereby agrees to assume the risks, duties, and liabilities hereinafter specified, and that the transportation shall be upon the following conditions, which are admitted and accepted by said shipper as just and reasonable, viz.:"

Then follow the twelve conditions, including No. 9, in which the shipper agreed—

"Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed * * * for a horse or mule $100."

The shipper, J. T. Ireland, signed this contract. Furthermore, the contract recites that his attention "has been called to the terms, conditions, *value,* etc., herein named."

Here is a distinct declaration, expressly assented to by the shipper, that he had the option of two rates; that he accepted the lower rate with its comcomitant obligation that if his stock was damaged he would not claim more than $100 a head "which amount, it is agreed" is "as much as such animals as are herein agreed to be transported are reasonably worth." Clause 9, is a material, substantial part of the very corpus of the contract.

and in no sense whatever is it an exception importing the exclusion of something which would otherwise be included, or the taking of some part of the subject-matter of the contract out of it. (Bouvier's Law Dictionary; 3 Words & Phrases, word Exception, first definition.)

With what show of reason can it be said that the recitals in the contract, that in consideration of shippers paying the lower of two rates that were open to them they agreed that the animals were worth no more than $100 a head, was an exception to the contract? Was an exclusion or taking away of a part of the contract? On the contrary, these provisions were pivotal, and without which the contract would not have been made. As this court said in Adams Exp. Co. v. Croninger, 226 U. S. 491, 509, the carrier has

"The inherent right to receive a compensation commensurate with the risk."

And this involves

"The right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported."

Is it not, then, entirely inadmissible to say that when plaintiffs valued their horses at $100 a head for the purpose of getting a lower freight rate, and under the circumstances above referred to, that this agreement upon their part was an exception to the contract? It went to the very marrow of the agreement, and without which it would not have been entered into by the carrier.

In addition to the cases cited in our original brief, we wish to call attention to two very recent cases decided by this court February 24, 1914. Great Northern R'y Co. v. O'Connor, and C., R. I. & P. R'y Co. v. Cramer—both of which arose out of limited valuation clauses in freight contracts, and in both of which cases the court held that the carrier's liability was limited to the valuation named in the contract.

In the O'Connor case the owner of the household goods arranged with a forwarder to have them shipped from Minneapolis, Minn., to Portland, Ore. The forwarder shipped them, with other goods sufficient to make up a carload, at the lower of two rates, under a bill of lading that valued the goods at $10 per cwt. The goods were lost in transit. The Minnesota courts permitted O'Connor to recover the full value of the goods as testified to by witnesses on the trial and refused to limit the recovery to the bill of lading valuation. This court reversed the judgment of the Supreme Court of Minnesota and held that the shipper could not recover more than the bill of lading valuation, in an opinion in which the following language was used:

"In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article or a distinct agreement as to the value of each shipment. If no value is stated, the tariff rate applicable to such a state of facts applies. If, on the other hand, there are alternative rates based on value and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that

class, and if sued for their loss, it is liable only for the loss of what the shipper had declared them to be in class and value.

"4. Nor was the result changed because of the use of printed forms. This appears from the ruling in Hart v. Pennsylvania R. R. Co., 112 U. S. 331, where it was claimed that the shipper had not been asked to state the value, but had merely signed a printed contract naming a value. The court said: 'The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.' The rule of the *Hart, Carl and Harriman* cases was not applied in the court below, and the judgment must be reversed," etc.

And in the Cramer case a recovery was allowed by the Iowa courts for damage and death to part of a carload of 60 hogs, in excess of $600. They were shipped under a live stock contract limiting the value of said animals to $10 a head. This court, notwithstanding a State statute similar to Section 196, Kentucky Constitution, declared any limitation such as the agreed valuation in the contract to be void, and notwithstanding this court in the Solan case, 169 U. S. 133, had upheld the validity of said Iowa statute, held that on authority of the Interstate Commerce Act and the Carl and Harriman cases, Cramer could not recover in excess of $10 a head for the hogs that were damaged or that died.

Respectfully submitted,

R. A. Thornton,
Chas. H. Moorman,
Benjamin D. Warfield,
Counsel for Plaintiff in Error.

March 18, 1914.

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Supreme Court, U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 531.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CATESBY WOODFORD ET AL.

MOTION TO DISMISS FOR WANT OF JURISDICTION AND BRIEF IN SUPPORT OF SAME.

ROBERT B. FRANKLIN,
ROBERT C. TALBOTT,
Attorneys for Defendants in Error.

(23,660)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 531.

LOUISVILLE & NASHVILLE RAILROAD CO.,
PLAINTIFF IN ERROR,

vs.

CATESBY WOODFORD AND JOHN T. IRELAND,
DEFENDANTS IN ERROR.

MOTION TO DISMISS.

Come the defendants in error and move the court to dismiss this appeal and writ of error for want of jurisdiction, and in support of this motion file and submit brief styled "Brief for Defendants in Error on Their Motion to Dismiss."

ROB'T B. FRANKLIN,
ROB'T C. TALBOTT,
Attorneys for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 531.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plaintiff in Error,*

vs.

CATESBY WOODFORD and JOHN T. IRELAND, *Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR ON THEIR MOTION TO DISMISS.

May it please the Honorable the Justices of the Supreme Court:

On the motion of the defendants in error to dismiss this appeal we beg to submit the following:

First. Nature of the Case.

The defendants in error, Catesby Woodford and John T. Ireland, on the 17th day of December, 1910, undertook to ship over the lines of the Louisville & Nashville Railroad a number of race horses from Lexington, Kentucky, to Juarez, Mexico.

The car containing the horses was destroyed by fire in the switch yards of the Louisville & Nashville Railroad at Frankfort, Kentucky, and this action was instituted in the Fayette Circuit Court, Kentucky, on the 6th day of January, 1911, to recover the sum of $25,250 in damages for the loss of the horses.

The trial resulted in a verdict for $15,000 in favor of the defendants in error, and upon appeal to the Court of Appeals of Kentucky the judgment was affirmed.

A Federal question is sought to be introduced into the case in connection with the bill of lading.

The bill of lading was a printed form, placing on each and every horse a nominal value of $100.

At the time this bill of lading was issued and at the time this action was instituted and the answer filed in the Fayette Circuit Court, under the laws and decisions in Kentucky, this arbitrary limitation of $100 was unenforcible, and consequently no one paid any attention to it.

The bill of lading was not filed with the petition, but later on in the case, on motion of the Louisville & Nashville Railroad Company, it was produced and filed.

The railroad company, by its answer, traversed the material allegations of the petition and plead contributory negligence.

It did not undertake to plead the execution or delivery of this bill of lading of limited values, nor did it attempt in any way to enforce the provisions thereof.

On the other hand, the railroad went to trial without making such question, and at the conclusion of the evidence not only did not ask an instruction limiting the recovery, in case there was a recovery, to the nominal valuations ($100 each) fixed by the bill of lading (conceding for the sake of argument it could ask such instruction without by answer making such defense), but, on the contrary, moved the court to give the following instruction (being instruction "D" asked by the plaintiff in error shown by the record herein):

> "If the jury find for the plaintiffs they will fix the damages in such sum as would represent the fair market value at Frankfort, Kentucky, of such of said horses as were killed, and in addition thereto such further sums as will compensate them for the difference, if any, between the value of such other of the horses in question as were injured, if any, just be-

fore they were injured, and their respective values after the extent of their respective injuries were reasonably ascertained."

It will accordingly be seen (and we wish to repeat it in order to emphasize it) that the plaintiff in error not only did not interpose any defense by way of endeavoring to enforce the arbitrary limitation of values in the bill of lading, but *on the other hand, in the trial court, requested the court to instruct the jury, in the event the jury should find for the plaintiff, to fix the damages in such sum as would represent the fair market value of the horses.*

After return of the verdict against the railroad company it filed its motion and grounds for a new trial, and afterwards its amended motion and grounds for a new trial, making no reference to the bill of lading or to this limitation in the bill of lading or effort to enforce this arbitrary limitation.

The railroad prosecuted this appeal to the Court of Appeals of Kentucky, and on the 31st day of August, 1912, filed its brief upon this appeal, and the cause was submitted to the Court of Appeals for final hearing on the 17th day of October, 1912, without any Federal question at all being made in the appellate court. The Court of Appeals did not render an opinion in the case before this honorable court, on January 6, 1913, delivered the opinion in the case of Adams Express Co. *vs.* Croninger. Thereupon the plaintiff in error filed a supplemental brief in the Court of Appeals of Kentucky, calling attention to the Croninger case, and undertook then to raise the Federal question in connection with the bill of lading in the Court of Appeals of Kentucky, but the Court of Appeals of Kentucky held that no Federal question was before it for consideration and declined to decide it, or even to consider it, assigning in its written opinion the reasons why, under the rules of procedure and practice in Kentucky, the question was not before it for decision or review.

Second. Excerpts from Opinion of Kentucky Court of Appeals.

We submit for consideration in this connection the following from the opinion of the Court of Appeals of Kentucky in this case:

> "Appellant filed its brief upon this appeal on August 31st, 1912, and the action was submitted in this court on October the 17th, 1912. On January 24th, 1913, appellant tendered a supplemental brief, suggesting, for the first time in this court, that the rule in this State that the limited valuation clause in contracts of shipment are not enforcible against the shipper in the absence of fraud, is in violation of section 20 of the 'Carmack Amendment' to the act of Congress known as the Interstate Commerce Law. It is now claimed, for the first time, that under said amendment, the duty to issue the bill of lading and the liability thereby assumed, was fully covered by the Federal act and supersedes all State legislation and decisions upon that subject, and that the effect of said act as thus claimed by appellant had been fully upheld by the opinion of the Supreme Court of the United States in the late case of Adams Express Co. *vs.* Croninger, decided January 6th, 1913, and reported in 226 U. S., page 491.
>
> "It is a well established rule of law in Kentucky that the contract of a carrier to relieve itself from its common law liability by arbitrarily fixing the value of the property carried, is in violation of section 196 of the Constitution, and void, except in cases of fraud practiced upon the carrier. Adams Express Co. *vs.* Walker, 119 Ky., 121; 67 L. R. A., 412; Southern Express Co. *vs.* Fox & Logan, 131 Ky., 257. The case at bar was practiced under that rule. It is, however, now pointed out that the bill of lading limited the carrier's liability for a stallion or jack to $150.00 and for a horse or mule to $100.00; and it is urged that under the 'Carmack Amendment' as interpreted in the Croninger case, *supra*, appellant's liability should have been measured at that rate. Appellees object

to the consideration of this question upon the ground that it was never presented to the trial court for adjudication, and consequently is not now before this court for review.

"It is an elementary rule, of almost universal application, that questions not raised in the trial court in some effective and appropriate manner, will not be considered on appeal. This rule was fully recognized in Acme Mills & Elevator Co. *vs.* Rives, 141 Ky., 786, where we said:

"It may be considered as well settled in this jurisdiction, that no error committed during a trial is available upon appeal unless it has been specifically relied upon in the grounds set forth in support of a motion for a new trial. L. C. & L. R. R. Co. *vs.* Mahoney, 7 Bush, 238; Commonwealth *vs.* Williams, 14th Bush, 297; Alexander *vs.* Humber, 86 Ky., 569; Hatfield *vs.* Adams, 123 Ky., 422. And this is true although objection was made and exception taken to the ruling at the proper time, as was done in this case. McLain *vs.* Dibble, 13 Bush, 297; Harris *vs.* Southern Railway Co., 25 Ky. L. R., 560. Unless the error of the circuit court is 'specifically made a ground for a new trial, it will be regarded as having been waived in that court, and is necessarily beyond the sphere of this court's supervisory jurisdiction, which is only to decide whether, on the grounds properly before it, the circuit court erred in its judgment. Hopkins *vs.* Commonwealth, 3 Bush, 481; Slater *vs.* Sherman, 5 Bush, 211; Civil Code, sec. 343.'

"Furthermore, a blanket assignment 'of error of law occurring at the trial and excepted to at the time,' as we have in the seventh and last ground assigned for a new trial in the case at bar, is not sufficiently specific to raise any question upon appeal. Muex *vs.* Muex, 81 Ky., 475; L. & N. R. R. Co. *vs.* McCoy, 81 Ky., 403; American Credit-Indemnity Co. *vs.* National Clothing Co., 122 S. W., 840. The office of the pleadings is to make plain the issues between the parties; and upon the issues thus raised the parties are entitled to have the case tried.

"Bearing in mind these elementary rules of pleadings and practice, and turning first to the pleadings,

we find no Federal question suggested anywhere. The answer, filed February 27th, 1911, contained a traverse of the petition and an affirmative plea of contributory negligence upon the part of Frakes and Moore, the attendants in charge of appellee's horses. The reply, filed March 10th, 1911, closed the pleadings. Up to that time the bill of lading, which constituted the contract of shipment had not appeared in the record, the appellant having prepared its defense strictly under the State law, without even an attempt to raise a Federal question. However, on November 9th, 1911, upon motion of appellant, the appellees filed the bill of lading. The trial began on December 18th, 1911, and was concluded on the 22nd, of that month, when the jury returned the verdict heretofore indicated. On the next day, December 23rd, 1911, appellant entered its motion, upon grounds then filed, for a new trial; but nowhere in the seven grounds distinctly and separately set forth as required by the Code, is a Federal question of any kind suggested. Neither did the additional grounds for a new trial, filed on January 6th, 1912, suggest any such question. The first and only reference, either directly or indirectly, to the Federal question now suggested, is contained in the order of February 3rd, 1912, which, after directing the filing of certain affidavits to be read on the motion for a new trial, and which in no way bore upon or suggested the Federal question closed as follows:

" 'Thereupon the court heard argument by counsel for plaintiffs and defendant respectively upon the motion and grounds for a new trial of this cause filed herein by the defendant, Louisville & Nashville Railroad Company; and also heard said counsel upon the Federal question raised by the defendant as to whether the contract in question for the transportation of said colts and fillies mentioned in the petition from Lexington, Kentucky, to Juarez, in the Republic of Mexico, was in violation of the provisions or any of them, of an act of Congress of the United States entitled an Act to Regulate Commerce, approved February 4th, 1887, as amended by an act approved March 2nd, 1889, by an act approved February 10th, 1891, by an act approved February 8th, 1895, by an

act approved June 29th, 1906, by a joint resolution approved June 30th, 1906, by an act approved February 25th, 1909, by an act approved June 8th, 1910; and having considered the said motion and grounds for a new trial of this cause, and having also considered the said Federal question and being of the opinion that said contract did not and does not violate any of the provisions of said act of Congress, the motion is hereby overruled, a new trial is refused.'

"It will be noticed that this order recited the fact that the court heard counsel upon the question whether the contract of shipment mentioned in the petition was in violation of any of the provisions of the act of Congress to regulate commerce, giving the date of the act and the amendments thereto; and that the court, having considered the motion and grounds for a new trial, and the said Federal question, was of opinion that the contract did not violate said act of Congress. By that order, however, the court overruled no motion of appellant based upon a Federal question, since no such motion had been made.

"In view of the fact that the question had been nowhere raised by the pleadings, instruction or motion for a new trial, or by a motion of any kind, we must conclude that it was raised orally, and was discussed as an academic question. But, under section 115 of the Civil Code of Practice, pleadings are required to be in writing; by sub-section 5 of section 317 instructions must be in writing; and under sub-section 1 of section 624, even notices are required to be written. A mere oral request of the trial court to instruct upon any given question brings no question before this court for review. Bell *vs.* Louisville Railway Co., 148 Ky., 189. The bill of lading contained a limitation of appellant's liability, which appellee was not required to plead. If appellant had desired to take advantage of its limited liability unquestionably it was its duty, under the Code of Practice, to specifically rely upon it in its answer. This it wholly failed to do.

"The futility of appellant's attempt to raise the question, for the first time, and orally, upon the argument of the motion for a new trial, will be easily

realized if we should conjecture what order the court could or would have entered, in case it had been of contrary opinion, to-wit; that the bill of lading did violate the provisions of the Interstate Commerce Act. It could not have sustained the motion for a new trial, because it was confined to the grounds specified: Civil Code of Practice, section 343; Harris *vs.* Southern Ry., 25 Ky. L. R., 559; 76 S. W., 151. Neither could it have given judgment for the appellant upon the pleadings and notwithstanding the verdict, because no Federal question was suggested by the pleadings. At most, the Federal question was merely raised and discussed academically, after the trial had been completed, and at a stage of the proceedings too late to bring it before this court. The reason given for the rule that a question not raised in the trial court will not be noticed on appeal because to do otherwise would deprive the opposite party of the proper opportunity of avoiding the effect of the objection by amendment, or by supplying any defects in his pleadings, applies strongly here.

"Furthermore, the Federal question now suggested was not only ignored in Instruction D, offered by appellant upon the measure of damages, but, it will be noticed that by that instruction appellant, practicing under the State law, asked the court to direct the jury, in case it should find for the appellees, to fix the damages in such sum as would represent the fair market value of the horses at Frankfort, of such as were killed, and the difference between the value of the horses that were injured and their value just before they were injured. By referring to instruction 4 given by the court, it will be seen that that instruction lays down the same measure of damages.

"It is a well settled rule in this jurisdiction that a litigant cannot complain of an instruction which is the same, or is to the same effect, as one he requested. Toner's Admr. *vs.* South Covington & C. St. Ry. Co., 109 Ky., 41; Union Central Life Insurance Co. *vs.* Hughes, 110 Ky., 26; First National Bank *vs.* Germania Safety Vault & Trust Co., 112 Ky., 734; L. & N. R. R. Co. *vs.* Penrod's Admr., 24 Ky. L. R., 50, 66 S. W., 1013, 1042; Stowers *vs.* Singer, 113

Ky., 584; Harris *vs.* Southern Railway Co., 25 Ky. L. R. 559; 76 S. W., 151.

"As was said in First National Bank *vs.* Germania S. V. & T. Co., *supra:*

" 'When the instructions offered by the appellant were subject to the same fault as the ones given by the court, there should not be a reversal for such error. Insurance Co. *vs.* Hughes' Admr., 110 Ky., 26.'

"Furthermore, it is well settled that it is not the duty of the trial judge, in a civil case, to give all the law of the case; if a party desires an instruction upon a question upon which no instruction is given, he must ask it in order to put himself in a position to have the question reviewed. J. B. Pilcher Mfg. Co. *vs.* Teupe's Extx., 28 Ky. L. R., 1350; 91 S. W., 1125. His failure to request an instruction precludes objection on the ground that those given were not complete. Patterson *vs.* T. J. Moss Tie Co., 30 Ky. L. R., 9; 97 S. W., 379. Not only did appellant fail to raise the question by his pleadings or by a requested instruction, but he tried the case throughout under the State law governing the question; and a rule permitting a litigant in an instance like this to commit himself by his pleadings to one theory of the case and try it throughout upon that theory, and subsequently to seek its reversal upon a question not theretofore raised, and after his opponent's opportunity to meet the newly-suggested question has passed, would inevitably lead, not only to a miscarriage of justice, but to a waste of the time of the tribunals provided by the State for the administration of justice. The Federal question now suggested was not raised in the trial court; is not before us for review; and cannot be considered or decided.

"Judgment affirmed."

Third. This Federal Question Not Raised at All in the Trial Court.

The Court of Appeals, in its opinion, gave plaintiff in error credit for more than it was entitled in saying that plaintiff in error raised the Federal question in the trial

court after its motion and grounds for a new trial were filed, as per recital of the order in the trial court overruling the motion and grounds for a new trial.

The plaintiff in error, in a supplemental brief, made the contention that it had raised the Federal question in the trial court, as shown by the recitals in said order. Our response refuting this was filed too late for the consideration of the court, and the court accepted the contention of the plaintiff in error as correct, whereas an examination of the order in question will show that the plaintiff in error did not raise this Federal question in the trial court at all.

What appears in the proceedings of the trial court on the subject is found in the following order:

> "Thereupon the court heard argument by counsel for plaintiffs and defendants respectively upon the motion and grounds for a new trial of this cause filed herein by the defendant Louisville & Nashville Railroad Company; and also heard said counsel upon the Federal question raised by the defendant as to whether the contract in question for the transportation of said colts and fillies mentioned in the petition from Lexington, Kentucky, to Juarez, in the Republic of Mexico, was in violation of the provisions, or any of them, of an act of Congress of the United States, entitled An Act to Regulate Commerce, approved February 4th, 1887, as amended by an act approved March 2nd, 1889, by an act approved February 10th, 1891, by an act approved February 8th, 1895, by an act approved June 29th, 1906, by a joint resolution approved June 30th, 1906, by an act approved February 25th, 1909, and by an act approved June 8th, 1910; and having considered the said motion and grounds for a new trial of this cause, and having also considered the said Federal question and being of the opinion that said contract did not and does not violate any of the provisions of said act of Congress, the motion is hereby overruled and a new trial is refused."

The above-quoted order is all there is in the record in the trial court on this subject, and the subject was introduced not by any pleading or written motion, but long after all the grounds for a new trial had been filed and merely in oral argument.

It will be seen from the above recital from the order book of the trial court that plaintiff in error was insisting that the contract, or bill of lading, was in conflict with the provisions of the acts of Congress with reference to interstate commerce and therefore not binding.

Plaintiff in error now contends it had reference to the present question of limitation of value to $100.00 each of the horses; if so, this record shows that plaintiff in error was then contending that that limitation was illegal and void, not that it was legal and binding.

Plaintiff in error was either talking about some other feature of the contract, or plaintiff in error was contending in the lower court that the attempted limitation of $100.00 each for the horses was in conflict with the provisions of the act of Congress, and illegal and void.

It is therefore easy to be seen that plaintiff in error was not making this present question at all, but plaintiff in error was obviously contending that the vague reference in the printed bill of lading to a lower freight rate violated the law as to fixed and uniform freight rates, which contention the lower court could not uphold, because there was nothing in the pleadings or evidence to show that this freight rate was really or substantially any less than the regular freight rate, and even if the contract of shipment was void or illegal, the railroad would still be liable for wrongful acts or negligence.

Accordingly, we submit that this question was never presented or referred to, in any form, in the lower court, either before or after trial.

Fourth. Too Late to Raise Federal Question.

But aside from all this, if the record of the lower court showed the contrary, and if it showed that the plaintiff in error did, on February 3, 1912, raise this same question in the trial court, it certainly came too late, under the rules of pleading, practice and procedure, because the trial ended December 23, and the motion and grounds for a new trial, and the amended grounds, were filed long prior to February 3, 1912, and no mention of this subject is found in any of the grounds, or amended grounds, for a new trial.

Plaintiff in error had had its day in court. It was then too late, under Kentucky procedure, to present such question to the trial court, especially after moving the trial court to instruct the jury to find the full market value of the horses.

As to raising Federal question in Court of Appeals, we must remember that in Court of Appeals of Kentucky the plaintiff in error was not in position to complain of anything except errors of the lower court excepted to at the time; that it must have presented to the lower court in its answer its defense, if it claimed to have one on this subject; that it must have called upon the lower court to pass upon its alleged defense; that it must have excepted to any adverse ruling of the lower court rejecting its defense; that it must have given the defendants in error an opportunity in the lower court to reply and to meet its defense based on the bill of lading by a plea of fraud or mistake in the execution thereof before it could rely on such alleged defense in the appellate court. The failure to make in its answer any such defense and in addition thereto the action of the railroad company in moving the trial court to instruct the jury to find for the defendants in error the fair market value of these horses, to our minds makes preposterous this afterthought to conjure up such a defense.

Fifth. Injustice of Not Raising Federal Question at the Proper Time.

Even without reference to the procedure and practice in this State requiring questions to be first raised in the trial court, and passed upon by the trial court, and limiting the jurisdiction of the appellate court to errors of the lower court complained of and excepted to at the time, what an injustice would have been done the defendants in error in this case if the appellate court had considered this alleged defense without plaintiff in error having been required to plead it in the trial court.

A written contract is not the end of all things. It is subject to a plea of fraud or mistake. If the plaintiff in error in this case had, by a plea, relied upon the limitation of value in the bill of lading, the defendants in error were entitled to reply thereto and to plead fraud or mistake in the execution of the bill of lading, and to be heard by evidence on the trial of the issues so made, and to show that no such agreement was made, or entered into, or mentioned, or discussed, or contemplated, and neither the railroad agent nor the defendants in error had any thought of making such limitation a binding, or enforcible part, of the bill of lading, all of which the defendants in error had a right to undertake to do under proper allegations of fraud or mistake in the execution of the bill of lading. But plaintiff in error sought to have the appellate court give it the benefit of such a defense without having given defendants in error an opportunity to interpose, by way of reply, their defense to the enforcement of this arbitrary limitation on the value of the horses. So that the plaintiff in error, in the Court of Appeals, was not only asking that which was contrary to procedure and practice in this State, but that which would have worked the greatest unfairness and injustice.

While the defendants in error did not present, and were not called upon to present, their defense to this arbitrary

limitation in the bill of lading (because the plaintiff in error did not, before the trial court, attempt such a defense), still there is enough in this record to show that the plaintiff in error really had not such a defense, and on that account, as well as for the reason that everybody in this State regarded such arbitrary limitation as void, plaintiff in error made no attempt to interpose such a defense.

The transcript of evidence shows there was no talk or discussion of rates or values, and no offer to agree on nominal values in order to get reduced rates.

The defendant in error, Ireland, merely requested the railroad company to furnish a car to ship eight (8) race horses from Lexington to the race course at Juarez, Mexico. He paid the freight on the car, $323.20, without having any talk or discussion with the agent about the different rates, or different rates based on different values, in fact, so far as the record shows, without knowing there was any such thing as different rates on the same thing for different values of the same thing (if, indeed, there was in reality different rates for different values between Lexington and Juarez, Mexico, on race horses about which we are not advised, and which the record fails to show).

The Supreme Court opinion, in the case of Adams Express Co. *vs.* Croninger, recites that the defendant, Adams Express Co., *made defense, by answer,* wherein it alleged, in substance:

First. That the defendant was an express company engaged in interstate commerce within the provisions of the Act of Congress of June 29th, 1906;

Second. That in obedience to that act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia;

Third. That its schedule showed that its rates and charges, when the value of the property to be carried was in excess of fifty dollars, were graduated reasonably, according to the value;

Fourth. That the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars;

Fifth. That the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment;

Sixth. That it (the defendant) required that the value should be declared by the shipper;

Seventh. That if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of fifty dollars;

Eighth. That the package so delivered was sealed;

Ninth. That the defendant did not know the contents or value;

Tenth. That if it had it would not have received it for carriage for less than the lawful published rate of fifty-five cents.

An examination of the case at bar will disclose that the plaintiff in error made no such allegations and made no such claims, and made no such defense.

Defendants in error did not know, in the case at bar, so far as this record shows, any of the material facts recited in the Supreme Court decision, above referred to, as essential, nor did the railroad company lack knowledge of the value of these horses, but, on the other hand, they were billed out by the agent of the railroad as "eight (8) race horses, four (4) attendants."

We need not stop to argue that this agent, living at Lexington, in the race horse center, knew that these eight race horses, which were choice enough, good enough, valuable enough and fast enough to be shipped from Lexington, Kentucky, to the race track at Juarez, Mexico, were worth more than $100.00 each. Until the contrary appears, everyone will be assumed to know the things of general and

common information in his vicinity. It would certainly be difficult to find any person in Lexington, Kentucky, old enough to be agent of a railroad company, who would not know that these eight race horses, which were being transported at a heavy expense to the race course at Juarez, Mexico, were worth more than $100.00 each. A person who had enough information and common sense to be railroad agent at a shipping point like Lexington, must certainly be presumed to know that much. Presumably, with the full knowledge of the valuable character of these horses, this agent, without any explanation as to difference in rates, if any, or that there were different rates, if any, billed these horses out as race horses, using one of the printed bills of lading containing arbitrary limitation of values, which were not referred to or discussed, in any way, because then, in this State, supposedly void. The agent simply informed defendant in error, Ireland, of the amount the car would cost him, and Ireland paid the amount without any consideration as to different rates depending upon different values, and without the agent intimating that he was charging a rate that would, as now claimed, limit the recovery in case the horses were killed or injured. We quote the controlling thought in the Supreme Court decision:

> "It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk."

Could it possibly have been claimed in this case that there was a fair, open, just and reasonable agreement limiting the amount recoverable by the shippers in this case? It is easy to understand why the shipper, Ireland, nor the agent, paid any attention to this printed limitation of value, and why

they did not discuss it or change the printed form from a nominal to the real value.

Everybody then thought that such limitation, in this State, useless, because then, seemingly, unenforcible, the law, in case of loss, substituting the real value for the nominal value in the printed form.

Why should they spend any time, or pay any attention to what everybody regarded a dead letter in all such printed forms of bills of lading?

Why should they spend any time on values when the law, in case of loss, substituted the real values for the printed nominal values?

If the plaintiff in error had undertaken to interpose such a defense, could it have claimed that the printed clause (as to every horse being valued at $100.00) in the bill of lading, executed under these circumstances, "was a fair, open, just and reasonable agreement to limit the amount recoverable by the shipper." It is not difficult, therefore, to understand why the plaintiff in error, at the conclusion of the testimony, moved the trial court to instruct the jury, if they should find for the defendants in error, to find the *fair market* value of the horses.

Sixth. Mere Inference Overcome.

Notwithstanding the failure of plaintiff in error, in its answer, to make such defense, and thereby give defendants in error an opportunity to reply and to introduce evidence on the issues, plaintiff in error will insist on the court drawing conclusions favorable to it from vague expressions in its printed bill of lading. Plaintiff in error will insist that the word "establish" and the words "reduced rate" fully take the place of the above-recited allegations in the answer in the case of Adams Express Co. *vs.* Croninger.

Whatever inferences plaintiff in error seeks to draw in its favor from the printed bill of lading in support of this at-

tempted defense are all swallowed up and annihilated by one tremendous, indisputable, and overwhelming fact appearing in this record, viz., that notwithstanding this printed bill of lading, and in the teeth of these mere inferences, the plaintiff in error, at the conclusion of the jury trial, offered a written instruction requesting the court to direct the jury to find the full market value of the horses, and one of its grounds for a new trial was the failure of the court to give this instruction in the form asked. This fact wipes out all inferences in its favor to be drawn from the printed bill of lading and all pretenses to such a defense.

Seventh. Neither "Specially Set Up and Claimed" Nor "Drawn in Question."

Under section 709 of the statutes, there are three classes of cases, and only three, which give the court jurisdiction. In the third class the matter must be "specially set up and claimed," and as plaintiff in error cannot contend that the matter here was "specially set up and claimed" in the trial court, the plaintiff in error will make an effort to bring this matter within the first or second class.

Of course, there can be no real question that it belongs to the third class. But assuming for the sake of argument it appertains to the first or second class, yet, even in these classes, the matter must be "drawn in question." At the conclusion of the evidence in the trial court the defendants in error asked an instruction to find for defendants in error the fair market value of the horses at Lexington, Kentucky, and the plaintiff in error asked an instruction, if the jury should find for the defendants in error, to find the fair market value of the horses at Frankfort, Kentucky, which point was so near Lexington that there could be no real difference in the market for race horses. But both plaintiff in error and defendants in error asked the court to in-

struct the jury to find the fair market value of the horses. Both sides asked the same thing. Neither side asked that this limitation of $100.00 be observed. How then can it be said that this matter was "drawn in question" at all? And not having been "specially set up and claimed" nor "drawn in question," how can the court take jurisdiction?

Eighth. No Adverse Decision of a Federal Question.

The Court of Appeals of Kentucky having held that no Federal question was before it for decision under the rules of procedure and practices in Kentucky, and having, for that reason, declined to entertain, decide or pass upon any Federal question, there is wholly lacking one essential to give jurisdiction—a decision of a Federal question adverse to the complainant.

Ninth. Authorities.

We will append to this brief memoranda compiled from the Digest and Annotated Statutes and from late Advance Sheets of the Supreme Court Reports in support of our contention.

Respectfully submitted.

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Memoranda.

(Syllabus:)

"The final judgment of the highest court of a State is not reviewable in the Supreme Court of the United States as the decision in favor of the validity of a State statute challenged as repugnant to the Federal Constitution, or as a denial of a right or immunity under such Constitution where such question is not raised, or specially set up in the trial court and the appellate court does nothing more than decline to pass upon the Federal question because it is not raised in the trial court as required by the State practice." Erie R. R. Co. *vs.* Purdy, 185 U. S., 148.

"A judgment of a State court upholding a State statute which is claimed to violate the Federal Constitution is not reviewable in the Supreme Court of the United States where the State court declined to pass on the Federal question, because it was not raised in the trial court as required by the State practice." Layton *vs.* Missouri, 187 U. S., 356.

"The Federal right, title, privilege, or immunity must be set up or claimed in the trial court whenever, under the State practice, the highest State court, in reviewing the judgments of the trial court, refuses to consider questions not therein raised."

Baldwin *vs.* Kansas, 129 U. S., 52.
Spies *vs.* Illinois, 123 U. S., 143.
Brooks *vs.* Missouri, 124 U. S., 394.
Morrison *vs.* Watson, 154 U. S., 111.
Erie R. R. Co. *vs.* Purdy, 185 U. S., 148.

"A judgment of a State court upholding a State statute which is claimed to violate the Federal Constitution is not reviewable in the Supreme Court of the United States, where the State court declined to pass on the Federal question because it was not raised in the trial court as required by the State practice."

Layton *vs.* Missouri, 187 U. S., 356.

"To give this court jurisdiction to review the decision of a State court, any title, right, privilege, or

immunity claimed under the Constitution or United States statutes must have been specially set up in the proper court below."

Re Spies (Spies *vs.* Illinois), 123 U. S., 131.

"To give this court jurisdiction to revise the judgment of the State court, it must appear that the point on which plaintiff relies was made in the State court and decided against him."

Maxwell *vs.* Newbold, 18 How., 511; 15, 506.
Taylor *vs.* Morton, 2 Black, 481; 17, 277.
Susquehanna Boom Co. *vs.* West Branch Boom Co., 110 U. S., 57.
Caperton *vs.* Bowyer, 14 Wall., 216.
Cockroft *vs.* Vose, 14 Wall., 5.
Messenger *vs.* Mason, 10 Wall., 507.
Farney *vs.* Towle, 1 Black, 350.
Hoyt *vs.* Thompson (Hoyt *vs.* Shelden), 1 Black., 518.
Santa Cruz County *vs.* Santa Cruz R. Co., 111 U. S., 361.
The Victory *vs.* Boylan, 6 Wall., 382.

"The Supreme Court of the United States can exercise appellate jurisdiction over the supreme court of a State in only a few special cases; and the ground of jurisdiction must be stated with precision, and it must appear of record that the right claimed was presented to the State court, and that the decision was against such right."

Poydras De. La. Lande *vs.* Louisiana, 18 How., 192.

"It is necessary to the jurisdiction of the Supreme Court under U. S. Rev. Stat. 709, U. S. Comp. Stat. 1901, p. 575, that the title, right, privilege, or immunity relied on be specifically set up or claimed in the State court at the proper time and in the proper way. The decision must be against the title, right, privilege, or immunity so set up or claimed."

Schuyler Nat. Bank *vs.* Bollong, 150 U. S., 85.

"Where, at the trial before a jury, no objection was made to the form of the oath, or on making the mo-

tion for a new trial, or on the motion for arrest of judgment; and such objection was first suggested in the State supreme court, and that court refused to consider the objection on the ground that it was not taken at the trial,—the Supreme Court of the United States cannot consider it, because the right was not set up or claimed in the proper court below."

Baldwin *vs.* Kansas, 129 U. S., 52.

"A title is not claimed under an Act of Congress so as to give the Supreme Court of the United States jurisdiction of a State court denying the validity of such title, where the claim is made only in the argument of counsel, and not in the pleadings."

Yesler *vs.* Harbor Line Comrs. (Yesler *vs.* Washington Harbor Line), 146 U. S., 646.

"The suggestion of a violation of a Federal right first made in a petition for the review, in the highest State court, of the judgment of an intermediate appellate court, is too late to serve as a basis for the exercise of the appellate jurisdiction of the Supreme Court of the United States, where it does not affirmatively appear that the State court passed upon the Federal question, and the denial of the petition may well have been upon the ground that the question, not having been suggested in the court below, could not be made available on appeal."

Chicago, I. & L. R. Co. *vs.* McGuire, 196 U. S., 128.

"A Federal question is not set up in a State court soon enough to sustain a writ of error from the Supreme Court of the United States, where it is first presented by new pleas filed after the case was decided by the supreme court of the State and remanded to the lower court for a new trial, and the supreme court on a second appeal refused to reopen the question involved on the first hearing to let in the Federal defense presented by the new pleas."

Yazoo & M. Valley R. Co. *vs.* Adams, 180 U. S., 1.

"A writ of error to a State court must be dismissed by the Supreme Court of the United States if no Federal question was decided by the State court."

California *ex rel.* Bryant *vs.* Holladay, 159 U. S., 415.

"It is not sufficient to give the Supreme Court jurisdiction in the case of a writ of error to the supreme court of a State that a Federal question might have been raised, or might have been decided, and was involved in the case; but it must appear, either in direct terms or by necessary intendment, that it was in fact brought to the notice of the court and decided by it."

Crowell *vs.* Randell, 10 Pet., 368.
Ocean Ins. Co. *vs.* Polleys, 13 Pet., 157.
Coons Gallaher, 15 Pet., 18.
Mills *vs.* Brown, 16 Pet., 525.

"To give the United States Supreme Court jurisdiction of a writ of error to the State court, the record must show that a Federal question not only might have been, but actually was, raised and decided adversely to the plaintiff in error."

Endowment & Benev. Asso. *vs.* Kansas, 120 U. S., 103.
Church *vs.* Kelsey, 121 U. S., 282.
Clark *vs.* Pennsylvania, 128 U. S., 395.
Gray *vs.* Coan, 154 U. S., 589.

"Even though it does not conclusively appear to be the fact, yet, where the State court may properly have disposed of the case without deciding the Federal question, its judgment is not reviewable in the Supreme Court of the United States."

Klinger *vs.* Missouri, 13 Wall., 257.

"A Federal question, although referred to in the assignment of error in the State appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on writ of error to the State court, where it does not appear that the State court dealt with the question, and it may have

refused to do so on the ground that it was not raised in the trial court."

Cox *vs.* Texas, 202 U. S., 446.

"The Supreme Court will not review a final State court judgment, even if it denies some title, right, privilege, or immunity of the unsuccessful party, unless it appears from the record that such title, right, privilege or immunity was specially set up or claimed and denied in the State court as belonging to such party under the Constitution or some treaty, statute, commission, or authority of the United States."

F. G. Oxley Stave Co. *vs.* Butler County, 166 U. S., 648.

"To give the United States Supreme Court jurisdiction, under U. S. Rev. Stat., Sec. 709, U. S. Comp. Stat., 1901, p. 575, it must appear of record that a Federal question was specifically set up or claimed in the State court at the proper time and in the proper way, and that its decision was against it."

Brooks *vs.* Missouri, 124 U. S., 394.
Leeper *vs.* Texas, 139 U. S., 462.
Texas & P. R. Co. *vs.* Southern P. Co., 137 U. S., 48.
French *vs.* Hopkins, 124 U. S., 524.
Chappell *vs.* Bradshaw, 128 U. S., 132.

"An assignment of errors cannot avail to present a Federal question when there is an entire absence in the record of any fact showing that such question was decided in the State court."

Fowler *vs.* Lamson, 164 U. S., 252.

"The right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way."

Mutual Life Ins. Co. *vs.* McGrew (1903), 188 U. S., 292.
Sayward *vs.* Denny (1895), 158 U. S., 180.
Morrison *vs.* Watson (1894), 154 U. S., 111.
Miller *vs.* Texas (1894), 153 U. S., 535.
Maxwell *vs.* Newbold (1855), 18 How., U. S., 515.
Hoyt *vs.* Shelden (1861), 1 Black., U. S., 518.

"The proper time is in the trial court, whenever that is required by the State practice in accordance with which the highest court of a State will not revise the judgment of the court below, on questions not therein raised."

Spies *vs.* Illinois (1887), 123 U. S., 131.
Jacobi *vs.* Alabama (1902), 187 U. S., 133.
Layton *vs.* Missouri (1902), 187 U. S., 356.
Erie R. Co. *vs.* Purdy (1902), 185 U. S., 148.
Mutual L. Ins. Co. *vs.* McGrew (1903), 188 U. S., 308.
Baldwin *vs.* Kansas (1889), 129 U. S., 52.

"The decision of a supreme court of a State on the second appeal in the case that it will not reopen the question involved upon the first hearing to let in a Federal defense presented by new pleas filed after the case was sent down for a new trial, merely settles the question of practice and does not present a Federal question."

Yazoo, etc., R. Co. *vs.* Adams (1901), 180 U. S., 8.

"Where the case is disposed of on the ground of waiver no Federal question is presented."

Beaupre *vs.* Noyes (1891), 138 U. S., 397.
Eustis *vs.* Bolles (1893), 150 U. S., 361.

"A decision of a State court resting on the grounds of State procedure does not present a Federal question."

Tripp *vs.* Santa Rosa St. R. Co. (1892), 144 U. S., 126.
Iowa Cent. R. Co. *vs.* Iowa (1896), 160 U. S., 389.
Grand Rapids, etc., R. Co. *vs.* Butler (1895), 159 U. S., 87.
Wood *vs.* Brady (1893), 150 U. S., 18.
Gibson *vs.* Mississippi (1896), 162 U. S., 565.

"A decision of a State court in an action founded on a statute of another State creating an action for debt, qualified by one year's limitation, that the failure to plead the statute in the complaint was

cured by its inclusion in the answers, filed more than one year after the death, presents no question as to the full faith and credit to be given such statute, so as to sustain a writ of error under section 709, but involves nothing more than a question of local pleading and practice."

Texas, etc., R. Co. *vs.* Miller (1911), 221 U. S., 408.

Texas, etc., R. Co. *vs.* Gross (1911), 221 U. S., 417.

"A Federal question, although referred to in the assignments of error in the State appellate court and in the Federal Supreme Court, cannot be considered by the latter where it does not appear that the State court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court."

Cox *vs.* Texas (1906), 202 U. S., 446.

"The Federal Supreme Court has no jurisdiction to review a judgment of a State court involving a question of estoppel or quasi-estoppel broad enough to support the judgment without reference to any Federal question. Leonard *vs.* Vicksburg, etc., R. Co. (1905), 198 U. S., 416; 25 S. Ct., 750; 49 U. S. (L. Ed.), 1108, holding that a decision of a State court that defendants in ejectment, who had successfully insisted in a prior suit in a Federal court that only a portion of a tract of land was in issue, cannot invoke the rule that a judgment determining the ownership of a portion of a tract is conclusive between the same parties, claiming under the same titles, as to the ownership of the entire tract, is not reviewable as denying any Federal rights asserted under the Federal court's judgment; as the State court merely applied the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings."

From Advance Sheets, Supreme Court Reports, October Term, 1912, No. 6, issued February 15th, 1913, Preston *vs.* City of Chicago, page 178:

> "Even, however, if we were at liberty to disregard the action of the State court and attribute to the plaintiff in error the status claimed by him, as in addition the court below held that the right to the relief prayed was in any event barred by long delay and laches, this would be sufficient to prevent us from reviewing the alleged Federal question."
>
> Moran *vs.* Horsky, 178 U. S., 205, 207; 44 L. Ed., 1038, 1039; 20 Sup. Ct. Rep., 856.

Same, page 179, El Paso & S. Railway Co. *vs.* Eichel & Weikel:

> "Whether the jurisdiction of this court is properly invoked depends upon whether any Federal right or immunity was duly set up or claimed by the plaintiff in error in the State court, and there overruled."

Same, No. 12, issued April 1, 1913, Consolidated Turnpike Co. *vs.* Norfolk & Ocean View Railroad Company, page 512:

> "The preliminary question is whether any such claim or right, under the 14th Amendment was 'specially set up' in the State court, and whether the record shows that the right so specially set up was denied."

Same, page 513:

> "The court having maturely considered the petition aforesaid, the same is denied. The words 'maturely considered' do not import any decision of the question made. Just such an entry has been held to be no more than a refusal to rehear the case."

Same, No. 13, issued June 1, 1913, C., I. & L. Railway Co. *vs.* Hackett, page 584:

> "Our right to review the judgment of the Illinois court arises under section 709, Revised Statutes, U. S. Comp. Stat., 1901, p. 575, and is therefore limited to a Federal right specially set up by the party seeking to take advantage of it, and denied by the State court."

Same, No. 15, issued July 1, 1913, Dill *vs.* Ely, page 620:

> "No question of Federal right reviewable by the Federal Supreme Court by writ of error to the Oklahoma Supreme Court was raised by the act of the United States court for the Indian Territory in overruling a demurrer by which defendant sought to assert a right under the Federal Constitution to a trial by jury, where, under the local practice, such an objection is not a ground for demurrer."

Same, page 620:

> "A judgment of the Supreme Court of Oklahoma in a case originally begun in the United States court for the Indian Territory is not reviewable in the Federal Supreme Court, under U. S. Rev. Stat., section 709, U. S. Comp. Stat., 1901, p. 575, on the ground of a deprivation of the right to trial by jury, where such right was asserted in the territorial court by demurrer, in which, under the local practice, it had no proper place, and was first reiterated in a motion for new trial in the State court when there was no issue of fact to be tried."

Same, Wood *vs.* Chesborough, page 706:

> "A decision of the State court adverse to the parties asserting a title to lands under State grants, which they claim cannot be defeated without a denial of Federal constitutional immunities, is not reviewable by writ of error from the Federal Supreme Court, where the State court rested its decision upon the effect of a decree in another suit as *res judicata*, and on the statute of limitations and laches as barring an attempt to vacate such decree."

22

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 531.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CATESBY WOODFORD ET AL.

REPLY BRIEF OF DEFENDANTS IN ERROR IN SUPPORT OF THEIR MOTION TO DISMISS FOR WANT OF JURISDICTION.

ROBERT B. FRANKLIN,
ROBERT C. TALBOTT,
Attorneys for Defendants in Error.

(23,660)

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PLAINTIFF IN ERROR,

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CATESBY WOODFORD AND JOHN T. IRELAND,
DEFENDANTS IN ERROR.

REPLY BRIEF OF DEFENDANTS IN ERROR IN SUPPORT OF THEIR MOTION TO DISMISS FOR WANT OF JURISDICTION.

May it please the Honorable the Justices of the Supreme Court:

The alleged error of the State court as to a date, discussed at length in brief for plaintiff in error, renders it proper, if not necessary, that we file a reply brief.

This alleged error of the Court of Appeals as to a date, more particularly referred to hereinafter, is but a clerical error in copying the transcript, and before the case is submitted we will take whatever steps may be necessary to have this error in the transcript corrected.

While this alleged error of the Court of Appeals as to a date is one, if not the principal, reason for replying to the brief of plaintiff in error, still, in replying we will not limit ourselves to that subject, because there are other matters in the brief of plaintiff in error which, unchallenged, might lead to a wrong impression.

Counsel for plaintiff in error gives a preliminary summary of "questions for decision," so framed that they admit of a more or less plausible answer on his side (if, indeed, they do not automatically answer themselves, in the very asking, in favor of plaintiff in error), but these "questions for decision" will be found to have little relation to the case at bar when all the facts and circumstances of the case are rightly understood.

First. Alleged Inconsistencies of the State Court.

Subdivision a, the Dodd Case.

If counsel for plaintiff in error had taken the trouble to examine the record of the Dodd case in the office of the clerk of the Court of Appeals of Kentucky (C., N. O. & T. P. Railway Company *vs.* Dodd, 153 Ky., 845), he would have found that the railroad company in that case, by its answer, pleaded the provisions of the contract upon which it desired to base a defense as to limited value, just as the Court of Appeals in its opinion said that the plaintiff in error in this case should have done (under the rules of pleading and practice in this State) if it had such a defense, or intended to rely upon such a defense.

Counsel for plaintiff in error would have found the second paragraph of the answer in the Dodd case to be:

> "For further answer herein defendant says that the shipment of horses and mules mentioned in the petition was an interstate shipment and was made under a release bill of lading which was signed by the plaintiff, R. A. Dodd, and that by the third clause

of said bill of lading it was and is stipulated and agreed as follows, viz:

"That this agreement is subject to the following terms and conditions, which the shipper accepts as just and reasonable and which he admits having read and having had explained to him by the agent of said carrier, viz:

"That the published freight rates on live stock of said carrier, are, in all cases, based on the following maximum valuations, and which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

"Stallions or jacks, not exceeding....	$150.00 each
"Horses or mules, not exceeding.....	75.00 "
"Mare and colt, together, not exceeding	100.00 "
"Ponies, not exceeding.....	40.00 "

* * * * * * *

"That the tariff regulations of said carrier provide that for every increase of one hundred per cent, or fraction thereof, in the above valuations, there shall be an increase of fifty per cent of the freight rate; and

"That the said shipper in order to avail himself of said published freight rates, agrees that said carrier shall not in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals unless an additional amount is hereby stated and paid for."

"Defendant says that its published rates of tariff which were issued and filed in accordance with the act of Congress to Regulate Commerce, provided for a release rate, and that the plaintiff in accepting said bill of lading contracted to pay the release freight rate based upon the values therein named of not exceeding seventy-five dollars for each horse or mule contracted and agreed that in case of loss or damage defendant should not be liable for any amount in excess of seventy-five dollars," &c., &c.

Thus, not only in the *Dodd* case, did the defendant by answer plead and rely upon the contract of released valuation, but in the quotation from the opinion in the Dodd case, copied in brief for plaintiff in error, on page 6, mention is made of the case of the Cincinnati, &c., Railroad Company *vs.* Rankin, 153 Ky., page 730, and in the Rankin case also, as appears from the opinion, the same kind of defense was made *by answer,* as required by the rules of pleading and practice in this State.

Subdivision b, Goode Case.

Counsel has much to say about the Goode case (C., N. O. & T. P. Railway Company *vs.* Goode, 153 Ky., 247) and the response to the petition for rehearing in that case (153 Ky., page 153).

The Court of Appeals reversed the judgment in the Goode case for errors in the record and remanded it to the trial court for another trial, and in the petition for rehearing and extension of the opinion the attention of the Court of Appeals was, for the first time, called to a question under the Federal Employers' Liability Act, and the Court of Appeals in extending its former opinion, simply directed that the trial court should permit the pleadings to be amended, so that this question could on the new trial already ordered, be raised by pleadings, as required by the State practice.

The case was thus reversed for other reasons and ordered to be retried before any suggestion was made to the Court of Appeals as to such Federal question.

The Court of Appeals did not reverse the Goode case, because a Federal question was suggested in the Court of Appeals for the first time, but having already reversed the case for other reasons and remanded it for new trial, it simply provided, in response to the petition for rehearing suggesting a Federal question, for amendment of the pleadings as to such Federal question in the trial court before such new trial should take place.

This being the simple, unvarnished truth about the Goode case, it is surprising what counsel has to say, and how much counsel has to say about that case. On page 8 counsel says:

> "It is impossible for us to reconcile this ruling in Goode's case with the refusal of the same court to reverse the judgment in the case at bar and remand it to the trial court with directions to permit the parties to try the case under the Carmack Amendment, as we asked be done, and to amend their pleadings accordingly if deemed necessary."

Surely there is a radical distinction between reversing a case, free from any error, merely and solely for the purpose of retrying it on a Federal question for the first time suggested in the Court of Appeals, where no such defense has been interposed in the trial court, as in the case at bar, and, on the other hand, as in the Goode case, directing that in a retrial of a case already reversed by the Court of Appeals for other reasons, and remanded for new trial, that such Federal question for the first time suggested in the Court of Appeals, should be tried out upon proper amendments of the pleadings in the trial court.

Where, for other reasons, there must be the trouble and expense of a new trial anyhow, it is quite a different matter under such conditions to litigate such newly-made Federal questions in the new trial.

A trial is necessarily an expensive proceeding. When the defendant is served with summons and directed to answer, it is but common fairness that every defense which the defendant has or could make should be set up and relied on so that a solemn trial thereof in a court of competent jurisdiction will, if free from error in the trial court, forever conclude the rights of the parties.

For the purpose of giving defendant time to thoroughly consider every defense which such defendant has or could have, the summons is required in every jurisdiction to be served for some given period of time before the answer is due.

In the case at bar the summons was served on January 9 (Transcript, page 3) and the answer was not filed until February 27 (Transcript, page 4).

Would it have been either just or fair to the defendants in error in this case for the Court of Appeals of Kentucky to reverse the judgment in this case when there was no error, in the proceedings of the trial court, to authorize such reversal, merely and solely to give the plaintiff in error an opportunity to make a defense which it failed (without fault of its opponent) to make when summoned to answer in the trial court?

A reversal means judgment for court costs against the unsuccessful party in the Court of Appeals, and it means cost and expense of another trial, and is it possible that counsel contends that the defendants in error should have been subjected to these costs and the trouble and expense of a new trial merely and solely because the plaintiff in error for the first time in the Court of Appeals suggested that it had a defense which it might have made, but did not make in the trial court?

There could be no difference in principle between this case and any other where the unsuccessful party, upon appeal to the Court of Appeals, would for the first time in the Court of Appeals suggest that he claimed to have some other defense which he failed to make and which he thinks should have been investigated and tried out, and ask a reversal for the purpose of having the case relitigated in the trial court. The appellate court being established for the purpose only of reviewing the proceedings of the trial court has not the machinery for investigating in that court alleged new defenses, and can it be seriously contended that upon a mere suggestion in the Court of Appeals for the first time that he claims to have another defense which he failed to make without fault of his adversary, a litigant who has had abundant opportunity to make all of his defenses in the trial court, can ask a reversal (with judgment for court costs against his antagonist) to give him an opportunity to see

whether his newly-claimed defense can be successfully maintained in a trial court.

Counsel says and reiterates that this released valuation of $100 was and is valid. This is prejudging the case without having given the defendants in error an opportunity to be heard, or to defend, and without requiring the railroad company to allege and prove the things which were alleged in the Croninger case to entitle the railroad company to maintain such a defense and without giving the defendants in error an opportunity by answer to controvert its contentions, or to plead fraud or mistake as to this clause of the paper in question.

By the way, as every one is presumed and required to know the law, can a litigant be heard to say that he desires a new trial on the ground that he did not know the law at the time of the first trial?

Further, and in this connection, it will be observed that the counsel for plaintiff in error who prepared and signed the brief in this court was not the counsel for plaintiff in error who appeared in the trial court, and the counsel who appears for the plaintiff in error in this court and who prepared the brief in this court makes the plea that the plaintiff in error did not know the law (or that it would afterwards be held that the bill of lading might be enforced in an interstate shipment), whereas the counsel who appeared in the trial court and who filed a brief in the Court of Appeals of Kentucky contended, as shown by the transcript, page 327, that he raised the Federal question as to released valuation in the trial court. Of course, he could not have raised such a question without knowing the law, and while we have shown so conclusively that he did not raise the Federal question in the trial court that the plaintiff in error by its present counsel in this court has abandoned the claim that this Federal question was raised in the trial court (and takes the position to the contrary that it did not know at the time of the trial that such question could be made in the trial court with any hope of success), still the

fact remains that counsel for plaintiff in error who appeared in the trial court contended in the Court of Appeals of Kentucky that he had raised the Federal question as to released value in the trial court, and while he did not do so as a matter of fact, yet his contention that he did do so indisputably implies and shows that he was aware of the law that he could make such a question, otherwise he could not possibly have been under the impression that he had actually made it.

So, we have the counsel for plaintiff in error in the State court contending that he raised this Federal question in the trial court, which presupposes that he knew such a question could be raised, and counsel who did not appear in the trial court now in this court claiming that the plaintiff in error did not know that such a defense could be made and assigning that as a reason for not making it in the trial court, and yet the inference remains, from the contention of counsel who tried the case in the lower court, that he knew such a defense could be made, otherwise he could never have claimed that he had made such a defense.

In this state of the record is the counsel for plaintiff who prepared the brief in this court (even though he must abandon the claim that such question was actually made in the trial court) in a position to claim that the counsel for the plaintiff in error in the trial court did not know that such contention could be made?

Is it possible that the plaintiff in error having failed to get relief by claiming that it made this Federal question in the trial court (and of course knew its right and undertook to assert it), now comes forward in this court and adopts another plan to get relief, claiming that it did not know its right in the lower court (and of course did not attempt to assert it there)? In all common fairness, shall a litigant be permitted to do this? Will not this court apply "the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings?" (Leonard *vs.* Vicksburg,

&c., Railroad Company, 198 U. S., 416; 49 U. S. (L. Ed.), 1108.)

But waiving all of these points for the present, can it be seriously contended that it would have been either just or right, to say nothing of procedure and practice, that the plaintiff in error in this case, by merely and for the first time in the Court of Appeals suggesting that it could have made such a defense, be entitled to a reversal of the judgment, otherwise regular and free from error, at the expense of the defendants in error and put the defendants in error to the trouble and expense of another trial for the purpose of ascertaining whether such defense could be successfully made?

An exception could not be made for this particular case, or for this particular question or kindred questions, but if such procedure were justifiable it must apply to all cases where an unsuccessful litigant would come before the Court of Appeals and suggest that it could make a defense it had not made and ask for a re-trial at the expense of its opponent, to give it an opportunity to try out such defense. Such a course would certainly be disastrous to litigants and to the public, and would set at defiance all procedure and lead to interminable litigation.

We beg pardon for this long-seeming digression, but it will be found pertinent to the contentions of counsel for plaintiff in error in his reference to the Goode case.

Second. Alleged Error of the State Court as to Date of Motion of Plaintiff in Error to File Bill of Lading.

Counsel for plaintiff in error has much to say on the subject of what counsel claimed was an error of the Court of Appeals of Kentucky in its opinion, reciting that the motion of the plaintiff in error to file the bill of lading was on *November 9th*, 1911.

Counsel for plaintiff in error says that the transcript

shows that this motion was made on the 19th day of November, 1911. The printed transcript, page 7, has the following:

> "And afterwards on the 19th day of November, 1911, the defendant filed a motion herein which is in words and figures as follows, viz:
>
> "The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action was in writing and that it has not been filed as an exhibit with the petition nor as a part hereof, and defendant now moves that the plaintiffs be required to file the said written contract as an exhibit with their said petition.
>
> R. A. THORNTON,
> *Attorney for Defendant.*"

The next date on the same page is November 11th, and the succeeding date is November 18th, the entry being (page 7 of the printed transcript):

> "And at a term of court held for said circuit on the 18th day of November, 1911, an order was entered herein, which is in words and figures as follows, viz:
>
> "Come the plaintiffs and file the contract of shipment referred to in the petition herein and the same is now noted of record."

So it is quite apparent from an inspection of the printed transcript that the motion was made prior to the filing of the bill of lading on the 18th day of November, and that the date of the filing of the motion as November 19th is an error. Before this cause is submitted we will take steps to correct this error in the transcript. The original order and the original endorsement on it by the clerk of the Fayette Circuit Court will show the date of the motion to be November 9th, 1911, instead of November 19th, 1911, so that the Court of Appeals of Kentucky was not mistaken at all as to this date, but was correct about it in its opinion.

As counsel for plaintiff in error is mistaken in this matter, it is unnecessary to take up his arguments based upon the idea that the Court of Appeals was in error as to this date.

Third. Bill of Lading Not Part of Petition.

In this connection and in connection with the contention that the bill of lading is part of the petition, it will be noticed that the plaintiff in error entered written motion as follows:

> "And afterwards, on the 19th day of November, 1911, the defendant filed a motion herein, which is in words and figures as follows, viz:
>
> "The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action was in writing, and that it has not been filed as an exhibit with the petition, nor as a part hereof; and defendant now moves that the plaintiffs be required to file the said written contract as an exhibit with their said petition.
>
> R. A. THORNTON,
> *Attorney for Defendant.*"

But it will further be observed from an inspection of the transcript that this motion was never acted upon by the court, and that *the court did not order the defendants in error to file said bill of lading as a part of or as an exhibit to the petition.*

After this motion was made and without the court acting upon it, the defendants in error, on the 18th day of November, 1911, took the following step, which appears on page 7 of the transcript:

> "And at a term of court held for said circuit on the 18th day of November, 1911, an order was entered herein, which is in words and figures as follows, viz:
>
> "Come the plaintiffs and file the contract of shipment referred to in the petition herein and the same is now noted of record."

It will be noticed that plaintiffs did not file the bill of lading *as a part of the petition, or as an exhibit to the petition.* If the petition is examined (Transcript, pages

1 and 2), it will be observed that the defendants in error made no reference to the bill of lading and of course did not file it or offer to file it as an exhibit or as a part of the petition; that in fact the defendants in error did not in the petition state whether the arrangement to ship the horses was verbal or in writing. When the bill of lading was produced on the 18th of November, 1911, after the motion was made on the 9th of November, 1911, it was simply filed and noted of record, without making it an exhibit or a part of the petition.

The answer of the plaintiff in error had been filed long before this, and after this bill of lading was filed the defendants in error did not file any amended petition nor did the plaintiff in error file any amended answer. So after the pleadings were made up the bill of lading was simply filed and noted of record, without being made an exhibit to the petition.

How, then, can it be contended for a moment by counsel for plaintiff in error that the record shows the bill of lading was filed as an exhibit to the petition, or, in other words, as part of the petition or pleadings, or that it was pleaded by the defendants in error?

Such contention is utterly unfounded, and there is nothing in the record to justify the counsel for plaintiff in error making such a contention. The Court of Appeals of Kentucky, in answer to the petition for rehearing, properly states the facts as to this phase of the controversy:

> *"Response to Petition for Rehearing by Chief Justice Hobson.*
>
> "We agree with counsel for appellant that the State courts must take judicial notice of acts of Congress no less than acts of the State legislature; and that it is not essential that the Federal question should have been raised in any special form in the trial court, but it is essential that the facts on which the Federal question rests must be presented in the record. The defense which the defendant now re-

lies on does not arise under the act of Congress; it arises under a written contract, and the provisions of this written contract were not pleaded. The bill of lading was not filed with the petition; it was filed in the action after the answer was filed in response to a rule, and is not a part of the pleadings. The bill of lading contains a number of clauses limiting and restricting the defendant's liability in certain contingencies. If the defendant desired to rely upon any of these clauses limiting its liability, it was incumbent upon it to plead the clause in its answer. It was not incumbent upon the plaintiff to anticipate and negative all the exceptions set out in the separate clauses of the contract (Ætna Life Ins. Co. *vs.* Rustin, 151 Ky., 108). The defendant did not set out in its answer or in any pleading any of the conditions of the contract, and not having pleaded the provisions of the contract, they were not before the trial court, and are not before this court. The provisions of the contract not having been pleaded, no Federal question is presented, as to the validity of the contract. It is true that on the motion for new trial, the Federal question was suggested in argument, but the trial was then over. It was too late to file an amended answer (Meadows *vs.* Goff, 90 Ky., 540; Brown *vs.* Van Cleave, 86 Ky., 381), and by section 386 of the Code, it was the duty of the court to enter judgment for the party whom the pleadings entitled thereto. The defendant having failed to plead the provisions of the written contract relied on, there was nothing which the court could consider to sustain the Federal question suggested on the argument of the motion for new trial. The matter not having been presented in the circuit court in such a manner that it could be considered in that court, and the case having been tried in that court without reference to any of the special provisions of the contract, the defense now suggested is not maintainable in this court. The defendant not only failed to plead the provisions of the contract now relied on; but asked on the trial an instruction inconsistent with the view now presented, and practiced its case throughout the trial on this basis.

"If section 196 of the State Constitution were not

> in force and if contracts limiting the common-law liability of carriers were upheld and enforced in this State, would it be maintained that the defendant in this action would be entitled to the benefit of the stipulation in the contract limiting its liability without pleading the contract or setting up this defense? And if this is true how can it be maintained that the defendant is in a better position because it relies on an act of Congress than it would be if the same defense had been allowed by the State law, and had not been pleaded or relied on in the trial? To grant a new trial for a matter not pleaded, and not relied on in the trial, would be to set a precedent making litigation interminable, which cannot be justified under the well-settled rules of legal procedure.
>
> "Petition overruled."

But even if the bill of lading had been filed with the original petition and as an exhibit thereto, or, by order, made part of the petition, it would not as a matter of pleading and practice have been necessary for the defendants in error to have anticipated the defense and negatived it, but the plaintiff in error by its answer should have pleaded any clause of the contract it desired to rely on as a defense, so as to apprise by its answer the defendants in error of the issues to be tried out, and as it failed to make any such issue in its answer, as required by our State procedure and practice, it is wholly immaterial whether the bill of lading was filed or not, or as to how it was filed.

As the plaintiff in error not only did not rely in its answer upon such a defense and invoke the provisions of the clause in question for its protection and allege that this part of the contract was fairly made and entered into and allege the other things pointed out in the Croninger case to justify the enforcement of this clause of the contract, but on the other hand moved the court to instruct the jury to find for the defendants in error, if they found at all for the defendants in error, the fair market value of the horses destroyed and injured, how is it important, or what dif-

ference does it make, whether the bill of lading was filed or not filed, or whether it was made a part of the petition or was not made a part of the petition?

Fourth. As to Necessity of Pleading this Defense.

Waiving for the time being and for the sake of argument the requirement that this matter should have been "specially set up and claimed" or at least "drawn in question" in the trial court (because the Court of Appeals of Kentucky has appellate jurisdiction only and can only review the errors of the lower court apparent in the record and relied on in the motion and grounds for a new trial and has no jurisdiction to consider a new question first made in the appellate court and not presented in the trial court), it seems to us that counsel for plaintiff in error does not meet the issues squarely in claiming that there was no necessity of *pleading the law* (the Federal statutes). But what about the more important subject of *pleading the facts* to which such unpleaded Federal statutes would apply?

Even though we were to concede that it were not necessary to specially plead the Federal statutes, nor that the Federal right should be "specially set up and claimed" or "drawn in question," still it was certainly necessary under the rules of pleading and practice in this State (as said in the opinion of the State court in this case) for plaintiff in error by its answer to allege *the facts* upon which it claimed the right to invoke the Federal statutes for its protection, as pleaded in the Croninger case, including the fact, if it were a fact, that it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Lexington, Kentucky, to Juarez, Mexico; that its rates and charges on race horses between those points were different for different values placed thereon and were graduated reasonably according to the value; that defendants in error knew that the charges upon the horses between said points were different for different values thereon and elected to

get the benefit of a lower rate by placing a limited value on said property, &c., &c., and giving defendants in error an opportunity to controvert these contentions and an opportunity to set up in reply that this clause of the contract was left in the printed bill of lading by fraud or mistake.

Fifth. As to Subject of Waiver and as to Wells, Fargo & Co. vs. Neiman-Marcus Co.

Counsel for plaintiff in error contends that there was no "waiver" of its rights, as said by the Court of Appeals in answer to the petition for rehearing, and proceeds to define waiver, technically, as being "the intentional relinquishment of a known right," and argues that as plaintiff in error did not know its legal right it could not waive it.

Perhaps the Court of Appeals was led into this expression by the fact that the counsel for plaintiff in error in the trial court, who also represented the plaintiff in error in the Court of Appeals of Kentucky (Transcript, page 327), contended that he had raised this Federal question in the trial court (which presupposes that he knew the legal right of his client in this particular).

But whether or not the failure of the plaintiff in error to attempt to make such a defense would be called a waiver in a technical sense is unimportant. The fact remains that it had every opportunity by law to interpose such a defense, and not only did not do so, but on the contrary asked an instruction to be given to find the fair market value of the property lost and injured. It is unimportant what the Court of Appeals called this, but looking to the conduct of plaintiff in error and to the effect it is clear that it has lost its opportunity to attempt to make such a defense.

Counsel on the same subject of *waiver* refers, in the case of Wells, Fargo Co. *vs.* Neiman-Marcus Co., 227 U. S., 469, to a statement made in argument by counsel in that case, which this court said "did not operate to withdraw the shipping contract from the case nor its validity from the

court's consideration." And counsel argues that if there was not a waiver in that case that the failure to plead in this case was not a waiver.

But there is nothing in this contention, for the reason that when we examine the opinion in the Wells, Fargo & Co. *vs.* Neiman-Marcus Co. case we find this:

> "In the 12th paragraph of its answer it asserted that if liable at all its liability should be limited to $50.00 as provided in said contract of shipment, which $50.00 has heretofore been tendered to plaintiff."

This same case of Wells, Fargo & Co. *vs.* Neiman-Marcus Co., which came to this court from the State of Texas, is reported (Texas Civil Appeals), 125 S. W., 615, wherein the court at greater length refers to the defense, saying:

> "The appellant defended on the ground that the value was placed on the furs at the time it received them, and its receipt contained a stipulation 'that in no event shall the express company be held liable beyond the sum of fifty dollars, at which sum the property is hereby valued, unless a different value is hereinabove stated'; that said package was received in good faith, appellant believing same was not of value exceeding $50.00, and that a charge for transportation was based upon such value; that it received the package from A. Jacobson & Bros., who were merchants and kept one of the express company's receipt books, and whenever they wished to express a package they would fill out a receipt therefor and deliver the package, the express company signing said receipt, which course was followed in this instance; that said Jacobson & Bros. knew that the express company made a greater charge for packages of value in excess of $50.00, and that where no value is specified a charge is made at the rate for packages of the value of $50.00 or less; that, by the failure of the shipper to place the value of said furs on the receipt, the express company was mislead to believe that said package was of the value of $50.00, which

> prevented the express company from making a greater charge for the transportation of said package, &c."

So we see that the defense in question was pleaded and relied on in the answer in that case, and as the answer itself containing that defense was never withdrawn we can readily see how the statement of counsel in argument in that case, referred to in the brief for plaintiff in error, was a mere "conceding for the sake of argument," and could not have the effect of withdrawing the defense set out in the *answer* and relied on in the answer—*as long as the answer itself was not withdrawn.*

Sixth. As to the Remaining Contentions of Plaintiff in Error.

It would unduly extend this reply brief to take up in detail every contention of plaintiff in error. We have taken time to discuss the more important features of the brief of plaintiff in error. Its contentions which we have not discussed do not rest upon any substantial basis.

For example, it is argued that if our State courts require litigants in these cases, as in all other cases, to conform to the State procedure and practice of pleading in the answer, the facts upon which such litigant claims the right to invoke the provisions of the Federal statutes, dire results would follow, because the carrier could, by failing to plead, indirectly favor one shipper suing it over another suing it. It seems to us that such a suggested situation is visionary and contrary to all rules of business and self-preservation.

From the effort that is being made in this case, but after the opportunity has passed, to rely on such a defense it may be reasonably inferred that this carrier, as will any other carrier, acting for its own interest and preservation, as in all human experience we may safely assume in advance it will do, will invoke the provision of the Federal statutes for

its protection by conforming to the State procedure and practice, whenever such carrier is really in a situation to make such defense—when it has previously made and duly filed with the Interstate Commerce Commission schedules showing its rates and charges between given points, and when its schedules show different rates and charges between the same points based on different values of the same articles, &c., &c., and when it can in good faith assert a defense in harmony with the doctrine laid down in the Croninger case,—when it can in good faith allege in its answer that it made with the shipper "a fair, open, just and reasonable agreement limiting the amount recoverable by the shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk."

All of which is respectfully submitted.

ROBERT B. FRANKLIN,
ROBERT C. TALBOTT,
Attorneys for Defendants in Error.

13

Office Supreme Court, U. S.
FILED
MAR 2 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 531.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

CATESBY WOODFORD ET AL.

SUPPLEMENTAL RECORD.

ROBERT B. FRANKLIN,
ROBERT C. TALBOTT,
Attorneys for Defendants in Error.

(23,660)

(23,660)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 531.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CATESBY WOODFORD ET AL.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1914.

1 COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at Frankfort, at the Capitol, on the Twelfth Day of February, A. D. 1914.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Appeal from the Fayette Circuit Court.

Be it remembered that heretofore on the 27th day of January, 1914, at a Court of Appeals held in and for the Commonwealth of Kentucky, at the Capitol in Frankfort, Kentucky, the following order was entered, to-wit:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WOODFORD, &C., Appellees.

Fayette.

Came the appellees, by counsel, and filed notice and tendered and moved the court to file an amended certificate of the Clerk of the Fayette Circuit Court correcting the transcript herein, and also filed affidavits of James C. Rogers and George De Long in support of said motion, to which motion appellant filed objection, and said motion is passed for five days for appellees to brief, same to be then submitted.

2 The following is a copy of the notice, with return thereon, filed by the foregoing order.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
vs.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Notice.

To the Appellant Louisville & Nashville Railroad Company:

You will take notice that on the 27th day of January, 1914, the appellees Woodford and Ireland, will move the Court of Appeals of Kentucky to permit to be filed an amended certificate of the Clerk of the Fayette Circuit Court showing and certifying that the date,

November 19th, 1911, is a clerical error in copying and should be November 9th, 1911, in the following quotation from page 7 of the printed transcript in this cause now pending before the Supreme Court of the United States:

"And afterwards on the 19th day of November, 1911 the defendant filed a motion herein, which is in words and figures as follows, viz:

The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action was in writing, and that it has not been filed as an exhibit with the petition, nor as a part hereof; and defendant now moves that the plaintiffs be required to file the said written contract as an exhibit with their said petition.

R. A. THORNTON,
Attorney for Defendant."

And that the appellees Woodford and Ireland will move the court to direct the Clerk of the Court of Appeals to amend his cer-
3 tificate to the transcript of the record of this cause now on file in the Supreme Court of the United States for the purpose of showing and correcting said clerical error in copying the transcript, and by said amended certificate to certify the true date, November 9th, 1911 in lieu of the date, November 19th, 1911 now erroneously appearing in said transcript and to transmit and forward to the Supreme Court of the United States his amended certificate correcting the clerical error aforesaid, and that the appellees will move the Court of Appeals to take such steps and enter such orders as may be necessary or proper in the premises to correct the clerical error aforesaid and to forward to the Supreme Court such copies of the proceedings of the Court of Appeals as may be necessary or required to correct the transcript in the Supreme Court as to the clerical error aforesaid.

ROB'T B. FRANKLIN,
ROB'T C. TALBOTT,
Attorneys for Appellees, Woodford & Ireland.

Executed the within notice Jan. 21, 1914 on the Louisville and Nashville Railroad Co. by delivering a true copy hereof to R. A. Thornton, attorney for said Company.

T. C. BRADLEY, *S. F. C.*,
By WM. WHITE, *D. S.*

4 The following is the written motion filed by said order:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Motion.

Come the appellees, Woodford & Ireland, and file notice executed on the appellant on January 21st, 1914, and in accordance

therewith move the court to be filed the amended certificate now tendered of the Clerk of the Fayette Circuit Court showing and certifying that the date, November 19th, 1911 in the following quotation on page 7 of the printed transcript in this cause now pending in the Supreme Court of the United States, to-wit:

"And afterwards on the 19th day of November, 1911 the defendant filed a motion herein, which is in words and figures as follows, viz:

The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action was in writing, and that it has not been filed as an exhibit with the petition, nor as a part hereof; and defendant now moves that the plaintiff be required to file the said written contract as an exhibit with their said petition.

R. A. THORNTON,
Attorney for Defendant."

5 is a clerical error in copying and that the true date is November *19th*, 1911, in the above quotation from the printed transcript; and the appellees further move the court to direct the Clerk of the Court of Appeals to amend his certificate to the transcript of the record in this cause now on file in the Supreme Court of the United States for the purpose of showing and correcting said clerical error in copying the transcript and to certify by such amended certificate the true date, November 9th, 1911 in lieu of the date, November 19th, 1911 now erroneously appearing in said printed transcript and to transmit and forward to the Supreme Court of the United States his said certificate correcting the clerical error aforesaid, and appellees further move the court to take such steps and enter such orders as may be necessary or proper in the premises to correct the clerical error aforesaid and to direct the Clerk of this Court to forward to the Supreme Court such copies of the proceedings of this court as may be necessary or required to correct the transcript in the Supreme Court as to the clerical error aforesaid.

ROB'T B. FRANKLIN,
ROB'T C. TALBOTT,
Att'ys Appellees.

The following is a copy of the amended certificate offered to be filed by the foregoing order:

6 Fayette Circuit Court.

CATESBY WOODFORD and JOHN T. IRELAND, Plaintiffs,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Certificate.

STATE OF KENTUCKY,
County of Fayette:

I, James C. Rogers, Clerk of the Fayette Circuit Court in and for the County and State aforesaid, having examined the printed copy

of the Transcript of this action, now pending in the Supreme Court of the United States, under the following style:

Supreme Court of the United States, October Term, 1913.

(23,660.)

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,

vs.

CATESBY WOODFORD et al., Defendants in Error.

Do hereby certify in reference to the following figures and words on page 7 of the printed transcript, towit:

7 "And afterwards, on the 19th day of November, 1911, the defendants filed a motion herein, which is in words and figures as follows, viz:

"The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action was in writing, and that it has not been filed as an exhibit with the petition, nor as a part hereof; and defendant now moves that the plaintiffs be required to file the said written contract as an exhibit with their said petition.

R. A. THORNTON,
Attorney for Defendant."

That the figures and words, "19th day of November, 1911" are a clerical error in copying and that the correct figures and words are "9th day of November, 1911"; and that that certificate issued by me on the 27th day of July, 1912, and appearing on page 28 of the printed transcript of record in the Supreme Court of the United States, should be amended, and I hereby amend the same for the purpose of showing and certifying that the transcript heretofore, to wit, on the 27th day of July, 1912, certified by me as being a true and complete transcript of the record and proceedings in this cause, is a true and complete transcript of said record with the exception that the figures and words, "19th day of November, 1911" should be "9th day of November, 1911," as the same appears of record and is now on file in my said office, and the former certificate of date 27th day of July, 1912, found on page 28 of said printed transcript is amended, as herein set out.

Witness my hand this 20th day of January 1914.

[SEAL.] JAMES C. ROGERS,
Clerk Fayette Circuit Court.

8 The affidavits of James C. Rogers and George De Long filed by the foregoing order, are as follows:

Supreme Court of the United States, October Term, 1913.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,

vs.

CATESBY WOODFORD and JOHN T. IRELAND, Defendants in Error.

Affidavit.

The affiant, James C. Rogers, states that he is Clerk of the Fayette Circuit Court, Kentucky, and was Clerk of said Court on and before November 9th, 1911; that he has examined the printed transcript herein; that as to the words and figures as follows, to-wit:

"And afterwards on the 19th day of November, 1911, the defendant filed a motion herein, which is in words and figures as follows, viz:

The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action, was in writing, and that it has not been filed as an exhibit with the petition, nor as a part hereof; and defendant now moves that the plaintiffs be required to file the said written contract as an exhibit with their said petition.

R. A. THORNTON,
Attorney for Defendant."

The figures in the first line above quoted, "19th day of November, 1911" are a clerical error in copying for, "9th day of November, 1911"; that said motion was filed on the 9th day of November, 1911; that the original motion, with the original date of filing, are now records in his office; that the endorsement on the motion referred to in the above quotation is in the handwriting of George De Long, who was then and yet is the Deputy Clerk of the
9 Fayette Circuit Court; that said original motion is endorsed in the handwriting of his said deputy as filed on November 9th, 1911.

The affiant further states that under the practice in the Fayette Circuit Court, a Motion Docket is made and kept for the more convenient and orderly dispatch of business; that the Motion Docket is intended to be called on Saturday of each week; that the motion quoted above and which was filed on November 9th, 1911, was placed and entered on the Motion Docket of the Fayette Circuit Court, which Docket was to be and was called on the following Saturday, to wit, November 11, 1911, and that the following is a copy of the entry made on said Motion Docket on November 9th, 1911:

"Woodford & Ireland vs. Louisville & Nashville R. R. Co. R. A. Thornton, Nov. 9th, 1911: To require plaintiff to file written contract."

Affiant knows from the date of filing endorsed on the above motion, November 9th, 1911, and also from the entry on said Motion Docket on November 9th, 1911, to be called on Saturday, November

11th, 1911, that the said motion was not filed on November 19th, 1911, as appears in said printed transcript, but on November 9th, 1911.

JAMES C. ROGERS,
Clerk Fayette Circuit Court.

10 Subscribed and sworn to before me by James Rogers this 20th day of January, 1914.

Witness my hand and seal.

[SEAL.]

A. B. THOMASON,
Notary Public, Fayette Co., Ky.

My commission expires at the end of the present session of the Senate.

Supreme Court of the United States, October Term, 1913.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,

vs.

CATESBY WOODFORD and JOHN T. IRELAND, Defendants in Error.

Affidavit.

The affiant, George De Long, states that he is, and was on and before November 9th, 1911, Deputy Clerk of the Fayette Circuit Court; that he has examined the printed transcript of the Supreme Court of the United States in the above styled action and as to the words and figures, viz:

"And afterwards on the 19th day of November, 1911, the defendant filed a motion herein, which is in words and figures as follows, viz:

The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action was in writing, and that it has not been filed as an exhibit with the petition, nor as a part hereof; and defendant now moves that the plaintiffs be required to file the said written contract as an exhibit with their said petition.

R. A. THORNTON,
Attorney for Defendant."

He states that "19th day of November, 1911" is a clerical error in copying, for, "9th day of November, 1911." He states that
11 the original motion above quoted was filed and endorsed by him in his own handwriting on the 9th day of November, 1911.

In addition to knowing that said motion was filed on November 9th, 1911, by reason of his endorsement on the back thereof as filed November 9th, 1911, he states that he also knows that said motion was made on the 9th day of November, 1911, as follows:

He states that a Motion Docket in the Fayette Circuit Court for each week is made and kept for the more convenient and orderly dispatch of business; that the Motion Docket is intended to be

called on Saturday of each week; that the motion quoted above and which was filed on November 9th, 1911, was placed and entered on the Motion Docket of the Fayette Circuit Court, which Docket was to be and was called on the following Saturday, to wit, November 11th, 1911, and that the following is a copy of the entry made on said Motion Docket on November 9th, 1911:

"Woodford & Ireland vs. Louisville & Nashville R. R. Co. R. A. Thornton, Nov. 9th, 1911: To require plaintiff to file written contract."

And he knows from the above Docket and endorsements thereon, as well as from the date of filing endorsed on said motion above quoted, that the said motion above quoted from page 7, of the printed transcript was made on November 9th, 1911, instead of November 19th, 1911, as printed in the printed transcript
12 of the Supreme Court of the United States, on page 7, thereof.

GEORGE DE LONG,
Deputy Clerk of Fayette Circuit Court.

Subscribed and sworn to before me by George De Long, this 20th day of January, 1914.

Witness my hand and seal.

[SEAL.]

A. B. THOMASON,
Notary Public, Fayette County, Ky.

My commission expires at the end of the present session of the Senate.

13 The following is a copy of the objection of appellant filed by the foregoing order:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Objection to Motion.

The Louisville & Nashville Railroad Company comes and objects to the motion it is advised will be made in this Court on January 27, 1914, by Robert B. Franklin and Robert C. Talbott, as attorneys for Woodford & Ireland, that this court direct the clerk thereof to amend his certificate to the transcript of the record of this cause now on file in the Supreme Court of the United States for the purpose of showing the alleged clerical error mentioned in said motion or otherwise.

The grounds of our said objection will more fully appear in our brief in support of said objection to said motion, which brief is hereto attached and made part hereof.

Respectfully submitted,

R. A. THORNTON,
C. H. MOORMAN,
B. D. WARFIELD,
Counsel for Louisville & Nashville R. Co.

January 26, 1914.

14 **Court of Appeals of Kentucky.**

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
CATESBY WOODFORD and JOHN T. IRELAND, Appellees.

Brief on Objection to Appellee's Motion to Correct Record.

As grounds of our objection to the motion referred to on the next preceding page, the Louisville & Nashville Railroad Company says:

1. This court, at this time, has no jurisdiction whatever of this cause, and is without power or authority to make the order asked for in appellee's motion, or any other order in said cause.

This court lost jurisdiction of this cause on April 5, 1913, when Honorable J. P. Hobson, the Chief Justice of this Court, allowed the writ of error from the Supreme Court of the United States to this court. Since that date this cause has been exclusively in said Supreme Court.

It is conceded that the record in the Supreme Court is identical with the record in this court and on which it decided the case. (152 Ky. 398, and 153 Ky. 185) There is not, therefore, any question here of the correcting of an error in the record which was sent from this court to the Supreme Court. But the claim made by Woodford & Ireland is that the clerk of the Fayette Circuit Court, in making the record for this court, on the appeal of the railroad company from the judgment of the Circuit Court in favor of Woodford & Ireland, did not correctly copy the record as it appeared in the office of said circuit court clerk, in that said clerk incorrectly copied a date as being November 19 when he should have copied it as being November 9. Therefore the motion of the other side now before the court involves in effect the correction of two records (1) the record in this court and (2) the record in the Supreme Court of the United States.

This motion comes too late.

15 In Federal Case No. 15,386, United States v. Hooe, et al. 26 Federal Cases, p. 369, the statement of the case and opinion of the court are as follows:

Syllabus.

"After a writ of error has been served and returned to the Supreme Court, the record is no longer before the court below and cannot be amended, although at an adjourned session of the same term, it appear that the writ of error has been dismissed in the court above at the request of the party praying an amendment.

"Motion by Mr. Mason, for the United States, to amend the record by adding a statement of the case, according to requisitions of the 19th section of the judiciary act of September 24th, 1789, (L. Stat. 83). It was a suit in equity which, since the last term, had been carried up by writ of error to the supreme court of the United States, and dismissed on the motion of the attorney of the United

States, because not accompanied by a statement of the facts upon which the decree was founded. This being an adjourned session of November term, 1802, the term in which the decree was rendered, it was contended that the decree was still in the power of the court.

"Mr. Swann and Mr. Lee, contra. The record is completely out of this court: the cause is no longer here. This court cannot amend a record which, in contemplation of law, is not before the court. The court refused to make the statement of facts, because they conceived the whole cause and record were completely out of their power by the writ of error," etc.

If, as in that case, the court held that even at the same term at which the decree was rendered the court had no power to correct the record because "the whole cause and record were completely out of their power by the writ of error," a fortiori must such be the rule here where several terms of this court have elapsed since the judgment of this court was rendered, and the Supreme Court of the United States allowed the writ of error to review the judgment of this court.

16 So much for the proposition that this court has not now any jurisdiction of this cause so as to authorize or permit it to do that which is requested in the motion of Woodford & Ireland.

2. As to how a record in the Supreme Court may be corrected we refer the court to Goodenough Horse-Shoe Mfg. Co. v. Rhode Island Horse-Shoe Co. 154 U. S. 635.

In that case the court said:

"We can only reexamine the final judgment in the suit, and for that purpose must look alone to the record of that judgment as it is sent to us. If parts of the record below are omitted in the transcript we may by certiorari have the omissions supplied, but we cannot here correct errors that actually exist in the record as it stands in the state court. For that purpose application must be made there, and, if necessary, upon sufficient showing we may remand the case in order that the court may proceed.

"In this case the judgment was rendered October 5, and the record of the judgment stopped then. What took place afterwards was nothing more than an attempt to avoid the judgment. The facts, which it is claimed give us jurisdiction appear only in the record of this subsequent proceeding, over which we have no supervision. If the defendant below desires to bring the case here it must take the necessary steps to correct the record, if in fact any error exists, so as to present the question it seeks to have decided. It is unnecessary for us to determine how this may be done or whether the courts of the United States have authority to require the state court to act in that regard. All we decide is that until the record of the judgment we are called upon to examine discloses the necessary question to give us jurisdiction, we cannot proceed."

3. The record in the Supreme Court is admittedly the same as the record in this court, as we have stated, therefore, on au-

17 thority of Chicago v. Bigelow, 131 U. S. page xciii, Appendix, we contend that as nothing was omitted or changed in any way in the record as it is in this court, in making the tran-

script of said record for the Supreme Court, there is no correction of the record that can now be made. The record in the Supreme Court is the same as was the record in this court (the court below), and hence that court will not allow a certiorari to this court to correct the record. As the Supreme Court said in the last cited case:

"Nor can we allow a certiorari, when it appears that nothing is omitted from the record which is of record in the court below."

In this connection we direct the court's attention to what is stated in Woodford & Ireland's notice as to what it is they propose to ask this court to do. It is to

"Move the court to direct the Clerk of the Court of Appeals to amend his certificate to the transcript of the record of this cause now on file in the Supreme Court of the United States for the purpose of showing and correcting said clerical error in copying said transcript, and by said amended certificate to certify the true date, November 9th, 1911 in lieu of the date, November 19th, 1911, now erroneously appearing in said transcript and to transmit and forward to the Supreme Court of the United States his amended certificate correcting the clerical error aforesaid" etc.

The certificate of the Clerk of this Court referred to in the foregoing language is

"THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

In obedience to the commands of the attached writ of error, I hereby transmit to the Supreme Court of the United States a complete transcript of the entire record with all things touching the same in the case of Louisville & Nashville Railroad Company, Appellant and Plaintiff in Error, vs. Catesby Woodford and
18 John T. Ireland, Appellees and Defendants in Error, *as the same appears from the records and files in my office.* (Our italics.) In testimony whereof I have hereunto set my hand and affixed my official seal.

Done at the Capitol at Frankfort, Kentucky, on this the 22nd day of April, A. D. 1913.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Court of Appeals of Kentucky."

How can the court direct its clerk to make any change in the foregoing certificate, without requiring the clerk to make his certificate recite something which is not true?

The record which the clerk of this court transmitted to the United States Supreme Court is, as the certificate recites, "as the same appears from the records and files in" the office of said clerk.

The other side do not claim to the contrary, and can not do so. For, unquestionably, the record in this court is identical with that which the clerk of this court transmitted to the United States Supreme Court.

Therefore, the notice which Woodford & Ireland have given does

not really show what in fact they want done, which is to have the record in this court corrected by an order of this court, and this cannot be done, as we have seen, because this court has no jurisdiction of the cause at this time. It is not now in this court for any purpose.

4. There is still another reason why the motion of Woodford & Ireland should be overruled and their application for correction of the record denied. It was their duty to see that the record made for this court by the clerk of the Fayette Circuit Court was correct before the case was heard in this court, if for any reason they deemed said transcript of record incorrect, and to have taken proper
19 steps in this court, before the hearing and submission of the cause in this court, to have the record corrected, if not correct. Not having done this it is too late now for them to attempt to have the record in this court corrected, after the case has been decided, the writ of error allowed by the Supreme Court, and the case removed from this court to that court.

In 3 Cyc. 143, the law on this subject is thus stated:

"An assignment of, and joinder in, error are an admission that the record upon which issue is joined is correct, and, afterward, neither party has a right to amend or urge defects in the record.

"Application for leave to amend, or objection on the grounds of defects in the transcript of record or the return on appeal, must be made prior to the submission of the cause and will not be entertained by the court after argument and submission save in peculiar and exceptional cases.

"Very special and exceptional circumstances must be shown to obtain leave to have omissions and defects in the transcript or return on appeal or writ of error supplied after a case has once been decided, and while an application for rehearing is pending."

It will thus be seen how rarely the court will entertain a motion to correct a record after argument and submission of a cause, and how much more rarely still will such motion be entertained after the case has been decided, although made within the time while the court has yet the full and exclusive control of the case.

But here, the parties waited until the court had lost control of the cause, and it had passed entirely away from this court into another court, before making the motion to correct the record. The point of the suggestion is that even if the cause were still within the control of this court it would deny the application on the principle of laches above cited.

20 On page 148 of 3 Cyc. there is a further discussion of this subject in these words:

"The failure of a party to apply for amendment of the transcript or return, or to object on the ground of defects of omissions therein, will constitute a waiver of the objection where the defects do not go to the jurisdiction of the appellate court."

"The failure to object in the lower court to defects or omissions in the transcript or return, where the amendments might be made there, constitutes a waiver of non-jurisdictional defects."

And on page 271 of 3 Cyc. is this:

"From a proper settlement it will be presumed that the contents of the bill, case, or statement are all that is necessary for presentation of the points in dispute—for example, all the evidence or proceedings in the lower court, or so much thereof as may be necessary—in the absence of a contrary showing in the record; and the truth of all recitals or statements therein as to such contents is presumed, as well, also, as recitals and statements of the facts proved or occurring on the trial, and the genuineness of the documents included therein."

5. In making this argument, of course we have not overlooked the decisions of this court in which it has been held that records could be corrected; or those in which it has been held that the correction was sought too late and therefore could not be allowed; or where the court held that the correction must be made in the trial court. But none of those cases exactly touches that which we have here,

21 where it is claimed that a record which has been sent by the clerk of this court to the Supreme Court of the United States in obedience to a writ of error from that court is erroneous and where this court was asked to correct the error long after it had lost jurisdiction of the cause and an error too not made by the clerk of this court, but which, if made at all, was made by the Clerk of the lower court in copying the record for this court.

Regretting that we have not the time available to present a more elaborate and complete argument, but resting assured that we are right in our position, and that the court will so hold, we respectfully ask that Woodford & Ireland's motion be denied.

Respectfully submitted,

R. A. THORNTON,
CHAS. H. MOORMAN,
BENJAMIN D. WARFIELD,
Counsel for Louisville & Nashville R. R. Co.

January 26, 1914.

22 Afterwards at a Court of Appeals, held as aforesaid, on January 29, 1914, the following order was entered:

LOUISVILLE & NASHVILLE R. R. CO.
vs.
WOODFORD, &C.

Fayette.

Came the appellees by counsel and filed a brief on their motion heretofore entered, with notice.

The brief filed by the foregoing order is as follows:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
vs.
CATESBY WOODFORD, &C., Appellees.

Brief for Appellees Catesby Woodford and John T. Ireland on Motion to Amend Certificate.

This cause is now pending in the Supreme Court on writ of error from this Court sued out by the appellant Louisville & Nashville Railroad Company, and the appellees Catesby Woodford and John T. Ireland have made a motion to dismiss for want of jurisdiction.

When counsel for appellant Railroad Company lately filed brief on motion to dismiss, they undertook to make some capital out of what they claim was a mistake or error of this Court as to a date referred to in the opinion of this Court as the 9th day of November, 1911, whereas the transcript shows the date to be the 19th day of November, 1911. This Court evidently got the correct date from the discussion of the case rather than from the transcript, but
23 the important fact is that this Court was correct, not mistaken, in reciting the date in the opinion of this Court as the 9th day of November, 1911.

Before the motion to dismiss for want of jurisdiction in the Supreme Court is submitted, we desire to take the necessary steps in order that the transcript may show the correct date and in order that it may be shown that this Court was not mistaken as claimed in the date as stated in the opinion.

It is accordingly our purpose to tender and move to file in the Supreme Court

First. The amended certificate of the Clerk of the Fayette Circuit Court showing the true date as being November 9th, 1911 instead of November 19th, 1911, and

Second. Also to tender and move to file the amended certificate of the Clerk of this Court and ask and insist upon the court filing one or both certificates to correct the clerical error in copying the record.

It will be noticed at the outset that the appellant Railroad Company does not even claim that the correct date is November 19th, 1911 instead of November 9th, 1911. It does not offer any affidavit that we are mistaken in saying that the correct date is November 9th, 1911.

The affidavit of the Clerk and Deputy Clerk of the Fayette Circuit Court show that the original motion now on file in their office is endorsed November 9th, 1911 and that the motion was
24 entered on the motion docket the same date. These things show for themselves in the office of the Clerk of the Fayette Circuit Court. The Clerk and Deputy Clerk are not testifying from recollection merely as to something that happened years ago, and about which no one else knows, but they are testifying as to what

now appears on the records of their office, to which anybody may go and look for themselves and testify.

So, from the failure to offer any counter-affidavits the appellant virtually stands here admitting that the transcript contains a clerical error in copying, but for some reason best known to itself it does not want the transcript to recite the true date, November 9th, 1911 as stated in the opinion of this Court.

The appellant presents two authorities. According to the first one no steps can be taken in the lower court, and according to the second the proper place to take these steps is in the State court, which means that these steps can be taken in the State court just as we are endeavoring to do. There ought to be no trouble about reconciling these two propositions. In the first case referred to by appellant it is evident that the court means that a State court cannot after writ of error has been sued out ignore the writ of error by having further an- original proceedings, or by undertaking to change or by amending the record by recitals of steps taken not already shown by the record.

We must bear in mind that we are not attempting here to change or add to or take from the record in the lower court, but we are simply endeavoring to have the transcript in the upper court correspond to the record as it exists in the lower court.

We can see the difficulties of offering to modify or amend
25 or change the record of the proceedings in the trial court after appeal has been taken.

But we are not trying to amend the record but simply to amend the transcript so it will conform to the record.

With these distinctions before us we will have no difficulty in understanding the two authorities cited by appellant.

As we are simply endeavoring to amend the transcript not the record in the lower court the proper way according to the second case cited by appellant is to begin in the State court just as we are doing, and as to State courts we are beginning in the first court where the clerical error appears—there is no error in the records of the trial court, but in the transcript in this court the clerical error appears and we accordingly come to this court with proof of the records in the trial court to correct the clerical error in this court preliminary to making a motion to correct it in the Supreme Court.

Had we first proceeded in the Supreme Court to correct the transcript we would have been met by this same authority cited by appellant to the effect that application should first be made to the State court—"For that purpose application must be made there" (See Goodenough Horse Shoe Co. v. Rhode Island Horse Shoe Co., 154 U. S. 635).

Knowing that if we first applied to the Supreme Court to correct this clerical error we would be met by this authority holding that we must first take this step in the State court, we have come to this
Court accordingly to correct a mere clerical error in copying
26 the transcript.

As stated above, there is a radical distinction between amending the record in the lower court and amending the transcript

so it will conform to the record in the lower court. We will append to this brief two authorities which make it clear that the Supreme Court will permit a clerical error in copying to be corrected by filing an amendment in the Supreme Court and we are merely asking that the Clerk of this Court be directed and authorized to furnish us an amended certificate so we can offer this amended certificate in the Supreme Court where we have no question that it will be ordered to be filed in accordance with the two cases appended to this brief.

Counsel claims that this Court has lost jurisdiction. This may be true as to original matters and steps, but it cannot be true as to merely correcting a clerical error in the transcript because according to the second case cited by appellant the place to correct such clerical error is in the State court, which means that the State court has the right or authority or jurisdiction so to do, notwithstanding the writ of error.

The Supreme Court would not say as it does in the second case (Goodenough Horse Shoe Co. v. Rhode Island Horse Shoe Co.) that the place to correct the error is in the State court, if the State court had no right or jurisdiction to proceed.

Appellant quotes a part of our motion, but to be properly understood the whole motion should be read from which it will appear that we are endeavoring to have this Court direct its Clerk to certify

27 to the Supreme Court the mere clerical error appearing in the printed transcript to afford us the basis of a motion to correct the clerical error in that Court without being confronted when we go there with the authority in the Goodenough Horse Shoe case that we should have taken this step in this Court before we moved the Supreme Court to permit the clerical error to be corrected.

As to the duty of appellees to see the record was correct in the Court of Appeals—it was just as much the duty of appellant who took the appeal to see the record was correct and this subject of incorrectness has not come up until appellant in the Supreme Court has lately undertaken to claim that this Court in its opinion made a mistake as to the date above mentioned.

We cannot conceive any reason either in practice or in common fairness why the truth should not be made to prevail as soon as any advantage is sought to be taken by reason of the truth not appearing in the transcript.

When we remember that we are not trying to change or amend the record in the lower court, but we are simply endeavoring for the sake of truth, to have the transcript in the upper court correspond as to said date to the record of the lower court (and to the date in the opinion delivered by this Court), we do not believe under the authorities appended to this brief that the Supreme Court will hesitate a moment to let the truth appear.

The orders of this Court putting us in a position to correct the record in the Supreme Court can certainly do nobody any harm.

Should this Court refuse to grant our motion, the appellant Rail-

road Company would no doubt contend in the Supreme
28 Court that this Court was not convinced that there was any error in the transcript which recites the date in question as being the 19th of November, 1911. We want the judgment of this court, upon the proof we have furnished, (with no proof to the contrary) recite that the date, November 19th, 1911 is a clerical error and that the correct date is the 9th of November, 1911 (as recited in the opinion in this Court).

The appellees in this case ought not to be handicapped in the Supreme Court with any refusal of this Court to enter an order reciting and showing the clerical error and giving its sanction and consent to the correction of the clerical error.

The Railroad Company can only hope to accomplish something in the Supreme Court by prevailing upon this Court to refuse to lend its sanction. The Goodenough Horse Shoe Co. case would in that event be cited by the Railroad Company in the Supreme Court as a reason for that Court refusing us any relief, because such relief had not been first granted by the State court.

We are not here asking anything about which there can be the slightest doubt—no one can doubt for a moment on the proof presented that the true date is November 9th, 1911, as recited in the opinion of this Court. We are here in accordance with the doctrine in the Goodenough case asking this Court to sanction this correction before we take*n* steps in the Supreme Court to the same end.

Appellees accordingly ask that their motion be granted.

Respectfully submitted,

ROB'T B. FRANKLIN,
ROB'T C. TALBOTT,
Attorneys for Appellees.

29 ***Authorities.***

Hudgins vs. Kemp, 18 Howard U. S. 530:

(Syllabus:)

"The Court will also permit a mere clerical error to be amended here, upon the Clerk's certificate, without sending a certiorari."

(From Text:)

"It is true an amendment may be made here by consent, as was done in the case of Fletcher vs. Peck, 6 Cranch, 87. And so, also, where it appeared by the certificate of the Clerk that he had committed a clerical error in the transcript, in the form in which he had entered a judgment, in ejectment, and it was evident from the declaration, that it was a mere clerical error, the Court suffered it to be amended here, without sending a certiorari to the Circuit Court to have it corrected. Brown vs. Woodward, 13 Pet. 1."

Nashua & Lowell, R. Corp. vs. Boston & Lowell R. Corp., 61 Fed. 245:

(From Text:)

"In Woodward vs. Brown, 13 Pet. 1, on receipt of a supplemental certificate from the Clerk of the Court below, the Supreme Court

allowed an amendment of a clerical error on motion of one party. The same was permitted in Chicago vs. Bigelow, 131 U. S. Append. XCIII."

30 And afterwards at a Court of Appeals held as aforesaid on February 6, 1914, the following order was entered, to wit:

LOUISVILLE & NASHVILLE R. R. Co.
v.
WOODFORD, ETC.

Fayette.

On motion of appellees it is ordered that their motion heretofore entered be and the same is now submitted.

And afterwards at a Court of Appeals held as aforesaid on February 12, 1914, the following order was entered, towit:

LOUISVILLE & NASHVILLE R. R. Co.
v.
WOODFORD, ETC.

Fayette.

The Court being sufficiently advised, on the motion of appellees heretofore entered, to file an amended certificate of the Clerk of the Fayette circuit court, delivered an opinion and said motion is now sustained, said amended certificate is ordered to be filed and the clerk of this Court is directed to certify the proceedings had on this motion as well as this opinion on the motion to the United States Supreme Court as an additional record.

The amended certificate ordered filed will be found at page 6 of this transcript.

The following is a copy of the opinion referred to in the foregoing order:

31 Court of Appeals of Kentucky.

February 12, 1914.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,
vs.
CATESBY WOODFORD, etc., Appellees.

Appeal from Fayette Circuit Court.

Opinion of the Court by Chief Justice Hobson on Motion.

The judgment of the circuit court in this case was affirmed by us on February 21, 1913. (See L. & N. R. R. Co. v. Woodford, 152 Ky. 398) Thereafter a writ of error was sued out by the railroad company and the case taken to the Supreme Court of the United

States. On page 7 of the printed transcript filed in that court, this appears:

"And afterwards on the 19th day of November, 1911, the defendant filed a motion herein, which is in words and figures as follows, viz:

"The defendant, Louisville & Nashville Railroad Company, says that the contract sued upon in this action was in writing, and that it has not been filed as an exhibit with the petition, nor as a part hereof; and defendant now moves that the plaintiffs be required to file the said written contract as an exhibit with their said petition."

32 A motion has been entered in this court by the appellees that an amended certificate of the clerk of the Fayette circuit court be filed showing that the true date is November 9th, not November 19th.; and that the clerical error be corrected and certified to the Supreme Court of the United States. The printed transcript corresponds with the transcript filed in this court when the case was determined by us, but it does not correspond with the original record in the Fayette circuit court. In the opinion of this court the date of this order is stated as November 9th, the date apparently being taken from the brief of counsel based on the original record. There was no controversy about the matter in this court, the error in the transcript not being observed by us or called to our attention by counsel.

Why the error in the transcript is material we do not understand. The facts shown on this motion conclusively establish the clerical error. The transcript on its face shows that there is an error; for the next order is dated November 11th, and the bill of lading referred to in the motion as shown by the transcript, was filed on November 18th. An error of this kind will not be corrected in the United States Supreme Court, but must be corrected in the State court. (Goodenough Horse Shoe Mnfg. Co. v. Rhode Island Horse Shoe Co., 5 Otto 368.) As the error cannot be corrected in the Fayette circuit court, it would seem that it must be corrected in this court in the same manner as if discovered before submission here; and that no injustice may be done, and that the Supreme Court of the United States may understand the facts, the motion to file the amended certificate of the clerk of the Fayette circuit

33 court, is sustained, and the clerk of this court is directed to certify the proceedings had on this motion as well as this opinion to the United States Supreme Court as an additional record.

Motion sustained.

R. A. THORNTON, *Lexington,*
BENJAMIN D. WARFIELD,
Louisville,
CHAS. H. MOORMAN,
Louisville, Ky.,
For Appellant.
ROBERT B. FRANKLIN,
Frankfort and Lexington,
ROBERT C. TALBOTT,
Lexington and Frankfort,
For Appellee.

34 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

I, Robert L. Greene, Clerk of the Kentucky Court of Appeals, hereby certify that the preceding 33 pages contain a true, full and complete transcript of the proceedings had in said Court of Appeals, on the motion of appellees referred to in said proceedings, as the same appears of record and on file in my office. All of which is certified to the Supreme Court of the United States as directed by the said Court of Appeals.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 14th day of February, A. D. 1914.

[Seal Kentucky Court of Appeals.]

ROB'T L. GREENE,
Clerk Kentucky Court of Appeals.

Fee for this transcript $10.50.

[Endorsed:] 531/23660.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* WOODFORD.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 531. Motion to dismiss submitted March 23, 1914.—Decided May 25, 1914.

In order that the denial of a Federal right may be the basis of reviewing the judgment of the state court, the claim of Federal right must be made in the state court in the manner required by the state practice, and unless there is an unwarranted resort to rules of practice by the state court to evade decision of the Federal question, this court will not review the judgment.

Raising the Federal claim of right on motion for new trial is not sufficient unless the court actually passes upon and denies the claim; and a decision by the appellate court that the Federal claim was not properly raised is not a denial of the Federal right but merely an enforcement of a rule of state practice.

Writ of error to review 152 Kentucky, 398, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, are stated in the opinion.

Mr. Robert B. Franklin and *Mr. Robert C. Talbott*, for defendants in error, in support of the motion.

Mr. Charles H. Moorman, *Mr. Benjamin D. Warfield*, *Mr. Henry L. Stone* and *Mr. Robert A. Thornton*, for plaintiff in error, in opposition to the motion:

By operation of law, the Carmack Amendment was written into the live-stock contract under which the shipment in this case was made, and that amendment repealed § 196, Ky. Const., as to such shipment. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Adams Exp. Co.* v. *Walker*,

119 Kentucky, 121; *C., B. & Q. Ry. Co.* v. *Miller*, 226 U. S. 513; *C., M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 133; *C., N. O. & T. P. Ry. Co.* v. *Dodd*, 153 Kentucky, 845; *Same* v. *Goode*, 153 Kentucky, 247; *S. C.*, 155 Kentucky, 153; *Same* v. *Rankin*, 153 Kentucky, 730; *C., St. P. &c. Ry. Co.* v. *Laita*, 226 U. S. 519; *K. C. Sou. Ry. Co.* v. *Carl*, 227 U. S. 639; *M., K. & T. Ry. Co.* v. *Harriman*, 227 U. S. 657; *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 477; *Southern Ex. Co.* v. *Fox*, 131 Kentucky, 257.

The Court of Appeals of Kentucky erred in holding that the live-stock contract was not pleaded; in refusing to apply the Carmack Amendment; and in holding that the Kentucky law applied in the absence of express reliance upon the Federal law in plaintiff in error's pleadings. *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *M. C. R. Co.* v. *Vreeland*, 227 U. S. 59; *M., K. & T. Ry. Co.* v. *Wulf*, 226 U. S. 570; *St. L. & S. F. Ry. Co.* v. *Seale*, 229 U. S. 156; *Wells, Fargo Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469.

This case does not fall under the third clause, but under the second clause, of § 709, Rev. Stat. *Chapman* v. *Goodnow*, 123 U. S. 540, 548; *Columbia Water Co.* v. *C. E. St. Ry. Co.*, 172 U. S. 475, 488; *Erie R. Co.* v. *Purdy*, 185 U. S. 153; *French* v. *Hopkins*, 124 U. S. 524; *Morrison* v. *Watson*, 154 U. S. 111; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Second Employers' Liability Cases*, 223 U. S. 1, 53, 54; *Y. & M. V. R. Co.* v. *Adams*, 180 U. S. 1.

There was no intentional relinquishment by plaintiff in error of a known right; therefore, there was no waiver amounting to an estoppel. 29 Am. & Eng. Encyc. Law (2d ed.), 1091, 1095; *Cable* v. *U. S. Life Ins. Co.*, 111 Fed. Rep. 19, 31; *Christianson* v. *Carleton*, 69 Vermont, 91; *First Nat. Bank* v. *Hartford Ins. Co.*, 45 Connecticut, 25, 44; *Rice* v. *Fid. & Dep. Co.*, 103 Fed. Rep. 427, 435; *Stackhouse* v. *Barnston*, 10 Vesey, Jr. 466; *Wells, Fargo Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469.

MR. JUSTICE DAY delivered the opinion of the court.

Catesby Woodford and John T. Ireland, defendants in error, plaintiffs below, brought suit in the Fayette Circuit Court, of Kentucky, against The Louisville and Nashville Railroad Company, plaintiff in error, defendant below, to recover damages for the loss of a number of race horses and injury to others shipped by them on November 17, 1910, over the lines of the defendant from Lexington, Kentucky, to Juarez, Mexico. There was a verdict for the plaintiffs in the trial court, judgment upon which was affirmed by the Court of Appeals of Kentucky (152 Kentucky, 398), and the case is here upon writ of error.

The amended petition contained an allegation that the defendant agreed by contract entered into in Fayette County, Kentucky, to transport the horses from Lexington to Juarez, and set forth the cause and extent of the loss to plaintiffs. The defendant answered, traversing the allegations of the petition and pleading contributory negligence, and the plaintiffs filed their reply. The defendant by motion sought to have the contract sued upon, which it alleged was in writing, filed as an exhibit to the petition, and subsequently the plaintiffs filed the contract of shipment and the same was noted of record. It provided, among other things, that, in consideration of the reduced rate, the extent of the damages for which the defendant would be liable should not exceed $150 for a stallion or jack, and $100 for a horse or mule, the agreed value of the animals, and across the face of the contract were stamped the following words: "The attention of shippers has been called to the terms, conditions, value, etc., herein named." It also appears that the contract of shipment was produced and filed in evidence by the plaintiffs.

One of the instructions requested by the defendant was to the effect that if the jury found for the plaintiffs they

should fix the damages at the fair market value of the horses killed and the difference in value before and after the injury of the other horses. After verdict and judgment for plaintiffs, the defendant filed its motion and grounds, and additional grounds, for a new trial, none of which, however, were based upon the provisions of the contract of shipment or any act of Congress. The court in overruling the motion said, however, that it had also heard counsel "upon the Federal question raised by the defendant as to whether the contract in question for the transportation of said colts and fillies mentioned in the petition from Lexington, Kentucky, to Juarez, in the Republic of Mexico, was in violation of the provisions, or of any of them, of an act of Congress of the United States entitled an act to regulate commerce, approved February 4, 1887," as amended, "and having considered the said motion and grounds for a new trial of this cause, and having also considered the said Federal question and being of the opinion that said contract did not and does not violate any of the provisions of said act of Congress, the motion is hereby overruled and a new trial is refused."

The case was taken by appeal to the Court of Appeals of Kentucky. After submission of the case to that court, the defendant filed a supplemental brief, urging the application of the law of the case of *Adams Express Co.* v. *Croninger*, 226 U. S. 491, and further insisted upon such application in its brief in reply to the plaintiffs' reply brief. The Court of Appeals noticed that the claim that the law of the *Croninger Case* controlled was first suggested by defendant in its supplemental brief, after submission of the case to that court, and that the case had been tried under the rule of law in Kentucky that a contract relieving a carrier from its common-law liability and limiting recovery to less than the value of the property carried is in violation of the Kentucky constitution, and held that it was elementary that questions not raised in the trial court in an ap-

propriate way, which by the Code of Practice of Kentucky is in writing, would not be considered on appeal, and, after detailing the proceedings in the trial court, concluded that no Federal question had thus been made. The defendant by petition for rehearing again insisted that the Federal question had been properly presented, but the Court of Appeals, admitting that state courts must take judicial notice of acts of Congress and that it was not essential that the Federal question should have been raised in any special form in the trial court, held that the facts on which such question rested must be presented in the record; that the provisions of the written contract, upon which the defendant then relied, not having been pleaded, no Federal question was presented, and moreover, that the defendant had asked for an instruction inconsistent with the view then presented, and conducted its case throughout the trial on that basis (153 Kentucky, 185).

That the defendant was entitled to make a defense under the Act to Regulate Commerce, as amended (June 29, 1906, c. 3591, 34 Stat. 584) is evidently an afterthought. The case was tried upon the theory that the Kentucky constitution and statutes were controlling, and it was not until after the decision of *Adams Express Co.* v. *Croninger*, *supra*, that an attempt was made to claim the benefit of the bill of lading based upon schedules filed with the Interstate Commerce Commission. It is true that a written bill of lading showing a limitation of $100 in value for each horse was filed in the case by the plaintiff below after the motion of the defendant had been filed, as the amended record discloses, but in order to assert this defense it was necessary not only to have the contract filed but that the defendant below should set up the facts showing that such defense was available to it. No pleading was filed by the defendant alleging compliance with the Act to Regulate Commerce by the filing of schedules containing the limitation as to the liability upon which

reliance is now placed. As we have already said, the record discloses that at the trial the defendant instead of relying upon the limited liability now claimed, entirely ignoring such limitation, itself asked and obtained an instruction that if the jury should find for the plaintiff it should fix the damages in such sum as would represent the loss suffered. Of course, the request to give this instruction was entirely inconsistent with the claim of limited liability under the Federal statute.

If a Federal question can be said to be involved at all, it was introduced into the record upon the argument of the motion for a new trial. Disposing of that question the Court of Appeals of Kentucky set forth that the question was not raised by the pleadings or requested instructions, or by motion for a new trial or written motion of any kind, and concluded that it must have been raised orally. It pointed out that under the Kentucky Code of Practice such contentions were required to be in writing, and that if the defendant desired to take advantage of its limited liability it must under the code of the State specifically rely upon that defense in its answer. In making this holding, the Kentucky court but enforced a rule of practice of that State. The decisions of this court not only have repeatedly held that a Federal right in order to be reviewable here must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court as required by the state practice. *Schuyler Nat'l Bank* v. *Bollong*, 150 U. S. 85; *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148; *Layton* v. *Missouri*, 187 U. S. 356. In this case there is no reason to believe that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice, and upon this

point this case comes within former rulings of this court, as we have seen.

As to the contention that the case really raised a Federal question because it involved the constitutional validity of a state statute when opposed to the exclusive rights secured under a Federal law,—an examination of the record shows that no such question was made in the state court, nor was it necessarily involved in the decision made in such sense as to make the case reviewable here on that ground.

It follows that the case must be dismissed for want of jurisdiction.